16-3877 & 17-8

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee-Cross-Appellant,

v.

PRIMEFLIGHT AVIATION SERVICES, INC.,

Respondent-Appellant-Cross-Appellee.

ON APPEAL AND CROSS-APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLEE-CROSS-APPELLANT
NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject-matter jurisdiction under §10(j), 29 U.S.C. §160(j), of the National Labor Relations Act ("the Act") ("§10(j)").[1] The court below entered its order granting a temporary injunction on October 24, 2016, and denied the Petitioner's Motion to Alter Judgment Pursuant to Fed. R. Civ. P. 59(e) on December 13, 2016. Appellant-Cross-Appellee PrimeFlight Aviation Services, Inc. ("PrimeFlight") filed its timely notice of appeal on November 17, 2016. Appellee-Cross-Appellant James G. Paulsen, Regional Director ("Director") of Region 29 of the National Labor Relations Board ("Board") filed a timely notice of cross-appeal on January 3, 2017. This Court has appellate jurisdiction under 28 U.S.C. §§1291 and 1292(a)(1).

COUNTERSTATEMENT OF THE ISSUES

(1) The district court, relying on applicable decisions of the Board and the National Mediation Board ("NMB"), concluded that there is reasonable cause to believe that PrimeFlight is under the jurisdiction

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[1] See the attached Addendum for the text of §10(j) and other relevant sections of the Act.

of the Board. Did the court correctly conclude that the Board will assert jurisdiction over PrimeFlight?

(2) A successor employer is bound to recognize and bargain with the collective-bargaining agent of its predecessor's employees if those employees comprise a majority of the successors' employees when the agent requests bargaining, the bargaining unit is appropriate, and the successor employer has hired a substantial and representative complement at the time of the request. Did the district court correctly find that PrimeFlight had hired a substantial and representative complement of its employees in an appropriate bargaining unit when the Union requested bargaining on May 23, 2016?

(3) PrimeFlight's refusal to recognize and bargain with the Union has an inherent deleterious effect that a final Board order will not cure, including loss of employee support for the Union, weakening of the Union's representative status, and the loss to employees of the benefits the Union may have secured if PrimeFlight had bargained in good faith. There is record evidence that the expected erosion of employee support for the Union is indeed occurring. Did the court

correctly exercise its discretion by concluding that there was likely irreparable harm?

(4) A court sitting in equity has wide discretion to fashion injunctive relief, but that discretion is cabined by the policies and purposes of the statute the court is enforcing. A fundamental policy of the Act is the freedom of contract, by which no party may be compelled to concede on any term or condition of employment. The district court concluded that this policy did not apply to it, and thus prohibited the parties from bargaining or agreeing on shift or staffing issues, further finding that such an order would not harm the Union. Was the district court's prohibition on bargaining over these subjects an abuse of its discretion?

COUNTERSTATEMENT OF THE CASE

This case is before the Court on an appeal by PrimeFlight and cross-appeal by the Director from an order of the United States District Court for the Eastern District of New York, by Judge Brian M. Cogan, granting in part and denying in part the Board's petition for a temporary injunction under § 10(j) of the Act. (SPA 1.) *Paulsen v.*

Primeflight Aviation Services, Inc., 16-CV-05338-BMC, 2016 WL 6205796 (E.D.N.Y. Oct. 24, 2016).

On September 26, 2016, the Director petitioned for temporary injunctive relief pending completion of Board administrative proceedings against PrimeFlight. (JA 7.) The petition was predicated on an unfair labor practice complaint issued by the Director on August 5, 2016. (JA 18.) The petition alleged, *inter alia*, that there is reasonable cause to believe that the Director will establish before the Board that PrimeFlight violated §§ 8(a)(1) and (5) of the Act as a successor employer by refusing to recognize and bargain with the Union and refusing to provide the Union information necessary for bargaining. The petition sought interim relief, including an order to recognize and bargain with the Union, pending the Board's resolution of the administrative complaint. (JA 13–16.)

A. Background: JetBlue Terminal Services at JFK Airport

For at least the past three years, JetBlue Airways Corp. has contracted out its terminal-services operations at Terminal Five in John F. Kennedy International Airport ("JFK"). The four terminal services JetBlue contracts out are baggage handling, line queue, skycap, and

wheelchair services. (JA 283.) Baggage handlers assist passengers in dropping off or picking up their luggage. (JA 259.) Distinct from the workers who load or unload planes, these employees put checked luggage on conveyor belts to be screened by the Transportation Security Administration ("TSA") but are not allowed outside. They also assist passengers in taking luggage off carousels, collect unclaimed bags, and staff the baggage carousel office. Line queue workers assist passengers in getting to and through the correct security line, but do not perform security work. (JA 38–39.) Skycaps provide curbside baggage checking services. (JA 384.) Wheelchair service employees help passengers who need assistance to and from their flights and help them with their baggage. (JA 385–86.) Workers in these different job categories frequently work together, share the same supervisors (JA 258), and can be reassigned without additional training. (JA38.)

Prior to the events at issue, Air Serv Corporation ("Air Serv") held the contract with JetBlue to provide baggage handling, line queue, and skycap services, while another firm, PAX Assist, operated wheelchair services. (JA 283.) On March 26, 2015, Air Serv recognized the Service Employees International Union, Local 32BJ ("the Union") as the

collective-bargaining representative of its terminal-services employees at JFK. (JA 35.) This was a "wall-to-wall" bargaining unit, meaning the Union represented Air Serv's terminal services employees in one bargaining unit, regardless of job classification. PAX Assist employees at JFK remained unrepresented.

B. PrimeFlight Takes Over JetBlue Terminal Services at JFK

PrimeFlight provides terminal services at a number of airports around the country. (JA 45.) In early 2016, PrimeFlight successfully bid to take over all of JetBlue's terminal services at JFK, replacing both Air Serv and PAX Assist. (JA 45.) PrimeFlight contacted both Air Serv and PAX Assist to obtain employee lists and to ask them to distribute notices to their employees about how to apply to continue to "support Jet Blue Operations." (JA 101–04, 170–71.) To maintain continuous, uninterrupted operation, PrimeFlight initially focused on hiring people actively working for Air Serv and PAX Assist, turning away other applicants. (JA 120.) PrimeFlight conducted the hiring and training, and employees received new PrimeFlight uniforms and ID badges. (JA 40–41.) By May 9, 2016, PrimeFlight had hired a total of 362 workers, all former employees of Air Serv and PAX Assist. (JA 239–43; SPA 3.)

PrimeFlight hired 76 baggage handlers, 35 skycaps, 64 line queue workers, and 174 wheelchair services workers. (JA 239–43; SPA 3.)[2] More than half of those hires, 189 of 362, or 52%, were former Air Serv employees. (JA247.) At least thirty former Air Serv employees were hired to primarily perform wheelchair services instead of their old job categories. (JA 233–37.) Notably, PrimeFlight hired no more bargaining unit employees between May 9 and May 23, 2016. (JA243.)

On May 9, 2016, PrimeFlight officially took over operation of JetBlue terminal services at JFK. (JA 45.) The transition was seamless. (JA 41.) Former Air Serv and PAX Assist employees arrived at the same work stations and reported to the same supervisors as they had the day before under their previous employer. (JA41, 260.) The only differences were that the supervisors were all now employed by PrimeFlight,

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[2] Due to variations in documents produced by PrimeFlight, the numbers of employees alleged in each job category and found by the court do not add up to the 362 total (76+35+64+174=349). Indeed, the ALJ in the underlying administrative proceeding found that as of May 23, Primeflight had hired 351 bargaining unit employees, 183 of whom had worked for Air Serv. (Add. 11.) However, none of these discrepancies materially affect the ratio of former Air Serv to non-Air Serv employees, and it is undisputed that former Air Serv employees comprised a majority of PrimeFlight's employees as of May 23, and a minority as of July.

employee's pay and schedules were in some cases somewhat different, and ID badges and uniforms were altered to read PrimeFlight. (JA 40–41, 259–60.) After taking over, PrimeFlight also began temporarily assigning workers to different terminal services based on daily needs. For instance, baggage handlers could be temporarily assigned to perform wheelchair services, and vice versa. (JA 260–61.)

C. The Union Requests Recognition and PrimeFlight Refuses

By letter dated May 23, 2016, the Union notified PrimeFlight that, having taken over Air Serv's operations and having hired a majority of employees who formerly worked for Air Serv, PrimeFlight was a successor employer to Air Serv and had a legal obligation to recognize and bargain with the Union.[3] (JA 59.) The Union noted that "the appropriate bargaining unit also includes employees providing wheelchair assistance." (JA 59.) The Union also requested information necessary for collective bargaining, specifically information on bargaining-unit employees, a copy of the employee handbook, and

[3] The Union also requested recognition and bargaining for a bargaining unit at Newark Liberty Airport. That request is not at issue in the present case.

employee benefits information. PrimeFlight questioned the basis of the Union's assertion (JA 62) and so the Union provided a copy of its recognition agreement with Air Serv. (JA 64–65.) PrimeFlight replied that this answer was "nonresponsive" and asked for more evidence that the Union was the collective-bargaining agent of Air Serv's employees. (JA 68.) The Union countered that it had already provided sufficient documentation of its assertion and asked what authority supported PrimeFlight's claim that other documents were necessary. (JA 70.) PrimeFlight did not respond. PrimeFlight continued to refuse to bargain until compelled to do so pursuant to the district court's order.

Three days after the Union requested bargaining, PrimeFlight embarked on a new round of hiring employees, most of whom were not former Air Serv workers. (JA 243.) By June 16, 2016, PrimeFlight's workforce had increased to 441 employees, a majority of whom were not former employees of Air Serv. (JA 247.) By July 6, 2016, PrimeFlight had a total of 507 unit employees. Since the Union had requested bargaining on May 23, PrimeFlight had hired an additional 5 baggage handlers, 3 line queue workers, and 135 wheelchair services workers. (JA 243–45.)

D. PrimeFlight's Refusal to Recognize or Bargain Adversely Affects the Union's Support

PrimeFlight's refusal to recognize the Union, along with certain anti-Union threats made by supervisors (JA 279–80), have chilled Union support among employees. Employees generally no longer speak openly of the Union at work, and many employees are even under the impression that they will be fired for talking about the Union. (JA 274.) In addition to being scared for their jobs, employees have grown frustrated by rumored changes in their working conditions and the inability of the Union to address their concerns, especially with regard to scheduling, an issue causing great dissatisfaction. (JA 275, JA 284.) As one employee noted "it's like voting, if nothing changes, then why do it?" (JA 284.) Finally, many employees are concerned that PrimeFlight could lose the JetBlue contract, and wonder whether it is worth the effort to support the Union in its protracted effort to be recognized when it is unclear how long PrimeFlight will even be their employer. (JA 284–85.) These concerns and frustrations are prompting some current employees to quit or seek other jobs. (JA 275, 283–84.) Employees who used to be Union supporters have stopped attending Union meetings and marches out of fear or frustration. (JA 280, 285–88.) One employee

who used to be active with the Union could not even be convinced to give evidence to the Board. (JA 284.)

E. The Union Files an Unfair Labor Practice Charge with the Board, the Board Issues Complaint, the Regional Director Petitions for Injunctive Relief, and the District Court Issues its Decision

On June 8, 2016, the Union filed an unfair labor practice charge with the Board alleging that, *inter alia*, PrimeFlight had violated §§ 8(a)(5) and (1) by refusing to recognize and bargain with the Union, and by refusing to provide the requested information. (JA 17.) After investigating the charge, the Director of Region 29 of the Board found it meritorious, and issued complaint on August 5, 2016. (JA 19–26.) PrimeFlight filed its answer to the complaint on August 19, 2016, denying that the Union represented its employees, but admitting that it had "continued to operate the portion of Air Serv's business at JFK Airport in basically unchanged form." (JA21, 29.) On September 26, 2016, following additional investigation, the Director petitioned the U.S. District Court for the Eastern District of New York for injunctive relief pursuant to § 10(j) of the Act. (JA 7.) The Director sought an order requiring PrimeFlight to, on an interim basis, recognize and bargain in good faith with the Union, provide the requested information, and cease

and desist from in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by § 7 of the Act. (JA 14–15.)

On October 24, 2016, based on oral argument and the parties' briefs and exhibits, the district court issued a Preliminary Injunction and a Memorandum Opinion and Order. The district court first concluded that PrimeFlight was an employer subject to the jurisdiction of the NLRB. (SPA 6–13.) The court then found that there was reasonable cause to believe that PrimeFlight was a successor employer and had violated § 8(a)(5) by refusing to recognize, bargain, or provide information to the Union. (SPA13–20.) Finally, the court concluded that PrimeFlight's actions were chilling employees and eroding their Union support, and that injunctive relief was just and proper. (SPA 20–21.)

The district court ordered PrimeFlight to, on an interim basis, recognize the Union, provide the requested information, and bargain with the Union in good faith. However, the court placed two conditions on the parties' bargaining. (SPA 24–26.) First, the court ordered that any collective-bargaining agreement reached by the parties would be void if the Board determined it lacked jurisdiction over PrimeFlight.

Second, the court ruled that any collective-bargaining agreement reached "may not include any provisions regarding a minimum number of shifts per employee or minimum staffing levels per shift."[4] (SPA 22.) The court's memorandum clarified that the intent of its order is that "Primeflight will determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs." (SPA 22.)

Pursuant to Federal Rule of Civil Procedure 59(e), the Director moved that the district court amend its order to remove the second condition, and add a provision that PrimeFlight "cease and desist in any like or related manner" from violating the Act. (JA 446) In a Memorandum Decision and Order dated December 13, 2016, the district court denied the Director's motion. (SPA 27.) In that decision, the court explained that not only could the parties not agree to a provision related to staffing, but the Union could not even raise the staffing issue in bargaining. (SPA 28.) The district court also denied the Director's request for a cease and desist provision enjoining PrimeFlight from violating the Act in "any like or related manner." (SPA 35.)

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[4] Hereinafter referred to as the prohibition on discussing "staffing."

F. The Administrative Law Judge Finds that PrimeFlight Violated the Act

On March 9, 2017, the Administrative Law Judge ("ALJ") issued her Decision and Order in the underlying administrative case.[5] The ALJ found that PrimeFlight was indeed under the jurisdiction of the Board. (Add. 10.) Rejecting PrimeFlight's assertion that it is sufficiently controlled by JetBlue, an air carrier subject to the Railway Labor Act ("RLA"), so as to be excluded from the Board's jurisdiction, the ALJ noted that PrimeFlight retains final discretion in hiring, firing and disciplinary decisions, and in setting rates of pay, benefits, disciplinary procedures, and other work requirements. (Add. 10.) The ALJ also found that JetBlue supervisors did not have the authority to direct the work of PrimeFlight employees, and the fact that JetBlue provided some equipment was not determinative. (*Id.*) Accordingly, the ALJ determined that JetBlue's control over PrimeFlight consists merely of

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[5] While the ALJ's decision regarding the underlying unfair labor practices was not part of the original record below, this Court may take judicial notice of it. *See Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1203 n.7 (9th Cir. 2005); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 157 n.3 (1st Cir. 1995). *See also Seeler v. Trading Port, Inc.*, 517 F.2d 33, 37 n.7 (2d Cir. 1975) (relying on ALJ decision issued after district court order).

"generalized, broad constraints which relate to standards of performance." (*Id.*)

The ALJ also found that PrimeFlight was a successor employer to Air Serv and was obligated to meet and bargain with the Union. (Add. 17.) In rejecting PrimeFlight's argument that it had not hired a substantial and representative complement at the time the Union requested bargaining, the ALJ found that PrimeFlight was in full operation as of May 9, had hired at least fifty percent of employees in a majority of the job classifications, and had fully provided its contracted services to JetBlue for the previous two weeks with no gap in operation nor substantive evidence that it intended to significantly expand its operation in any manner. (Add. 16.) The only evidence supporting a preexisting plan to expand operations was the testimony of PrimeFlight Vice President Barry, which the ALJ found to be "conclusionary and vague." (*Id.*) Accordingly, the ALJ found that PrimeFlight violated §§ 8(a)(1) and (5). (Add. 19.)[6]

[6] The ALJ also found PrimeFlight violated the Act by threatening employees with discharge for supporting the Union and by making unlawful unilateral changes in terms and conditions of employment

SUMMARY OF ARGUMENT

The court properly granted § 10(j) relief, applying the Second Circuit's well-established two-part test. The Director exceeded his relatively insubstantial "reasonable cause" burden by presenting a substantial and not frivolous legal theory, along with facts consistent with that theory. There is strong cause to believe that PrimeFlight is under the jurisdiction of the Board. Moreover, there is strong cause to believe that PrimeFlight is the successor employer to Air Serv and is therefore violating §§ 8(a)(1) and (5) by failing and refusing to recognize and bargain with the incumbent Union. The record demonstrates that PrimeFlight had hired a substantial and representative complement of employees at the time the Union requested bargaining. Because a majority of that complement were former Air Serv employees, PrimeFlight must recognize those employees' incumbent Union as their collective-bargaining agent. The court's reasonable-cause finding is supported by the record and longstanding precedent, and is not erroneous.

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without giving the Union notice and an opportunity to bargain. Those issues are not before the Court in this case.

The Director also established that a temporary injunction, pending a Board order, is "just and proper." The court's findings that Union support was seriously eroding due to PrimeFlight's unlawful conduct are supported by the record. Moreover, the court's interim order to recognize and bargain with the Union poses little or no harm to PrimeFlight.

However, the court abused its discretion when it prevented the parties from bargaining about staffing and failed to include a cease and desist order. Under Board law, staffing is a mandatory subject of bargaining. As such, a party under a bargaining obligation violates the Act if it refuses to bargain about staffing. The court exceeded its equitable discretion by overriding Congressional policy, and improperly substituted its judgment for Congress's when it decided what topics are legitimate subjects of bargaining. It also failed to appreciate the impact that such a prohibition would have on the parties' relative positions in bargaining. Furthermore, by failing to order PrimeFlight to cease and desist from engaging in related unlawful conduct, the district court gave PrimeFlight license to continue to frustrate the Act via different means,

thus failing to adequately prevent future irreparable harm to employee support for the Union.

ARGUMENT

A. Standard of Appellate Review

This Court reviews de novo the district court's legal conclusions, including its "reasonable cause" determination, and reviews a district court's determination of whether relief was just and proper for abuse of discretion. *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364 (2d Cir. 2001).

B. The Applicable § 10(j) Standards

Section 10(j) authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor-practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render ineffective a final Board order. *See Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1055 (2d Cir. 1980); *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975) (citing S. REP. NO. 105, 80th Cong.,

1st Sess., at 8, 27 (1947), *reprinted in* I NLRB, *LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947*, at 414, 433 (1985)). Thus, §10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See, e.g.*, *Seeler*, 517 F.2d at 37–38.

To resolve a § 10(j) petition, a district court in the Second Circuit considers whether there is "reasonable cause to believe" that a respondent has violated the Act, and whether temporary injunctive relief is "just and proper" under the circumstances. *See, e.g.*, *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 141–42 (2d Cir. 2013); *Hoffman*, 247 F.3d at 364–65; *Silverman v. J.R.L. Food Corp.*, 196 F.3d 334, 335 (2d Cir. 1999).

1. The "reasonable cause" standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court should not decide the merits of the case. *See Hoffman*, 247 F.3d at 365; *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032–33 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is "reasonable cause to believe that a Board

decision finding an unfair labor practice will be enforced by a Court of Appeals." *Id.* at 1033 (quoting *McLeod v. Bus. Mach. & Office Appliance Mech. Conference Bd.*, 300 F.2d 237, 242 n.17 (2d Cir. 1962)). District courts hearing § 10(j) injunction petitions are not to resolve contested factual issues. *See Palby Lingerie*, 625 F.2d at 1051–52 n.5. *See also NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570–71 (7th Cir. 1996). Instead, the Director's version of the facts "should be given the benefit of the doubt, *Seeler*, 517 F.2d at 3, and, together with the inferences therefrom, "should be sustained if within the range of rationality." *Mego Corp.*, 633 F.2d at 1031. *See also J.R.L. Food Corp.*, 196 F.3d at 335.

Similarly, on questions of law, the district court "should be hospitable to the views of the [Director], however novel." *Mego Corp.*, 633 F.2d at 1031 (quoting *Danielson v. Jt. Bd. of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230, 1245 (2d Cir. 1974)). The Director's legal position should be sustained "unless the [district] court is convinced that it is wrong." *Palby Lingerie*, 625 F.2d at 1051. This includes matters of the Board's statutory jurisdiction. *See Compton v. Nat'l Mar. Union of Am.*, 533 F.2d 1270, 1274 (1st Cir. 1976) (finding reasonable cause to believe that employer was subject to Board

jurisdiction in § 10(*l*) injunction); *Madden v. Int'l Org. of Masters, Mates & Pilots of Am., Inc.*, 259 F.2d 312, 313–14 (7th Cir. 1958) (finding reasonable cause to believe that labor union was covered by the Act in § 10(*l*) action).[7] In sum "appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed." *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995).

The ALJ's findings and legal conclusions in the underlying administrative case supply "a useful benchmark" against which to weigh the strength of the Director's theories of violation. *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001). The "preponderance of the evidence" standard applied by the ALJ is a higher burden of proof than the "reasonable cause" test. Therefore, it is appropriate for courts to rely on the ALJ's findings and conclusions in evaluating the district court's assessment of the Director's evidence and

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[7] Section 10(*l*) of the Act, 29 U.S.C. § 160(*l*), is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. *See, e.g.*, *Danielson*, 494 F.2d at 1242.

theories in support of a violation. *See Francisco Foods*, 276 F.3d at 288. *See also Seeler*, 517 F.2d at 37 n.7; *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 238 (6th Cir. 2003). Indeed, the "ALJ's factual findings are part of the record and cannot be ignored." *J.R.L. Food Corp.*, 196 F.3d at 335.

2. The "just and proper" standard

Once reasonable cause is established, § 10(j) relief is "just and proper" where the unfair labor practices threaten to render the Board's processes ineffective by precluding a meaningful final remedy, *see Mego*, 633 F.2d at 1034 (discussing *Seelers*, 517 F.2d at 37–38), where interim relief is the only effective means to preserve or restore the status quo as it existed before the violations, *Seeler*, 517 F.2d at 38, or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint. *Palby*, 625 F.2d at 1055. *Accord Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246, 255 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). In determining whether temporary injunctive relief is "just and proper," courts apply traditional equitable principles, "mindful

to apply them in the context of federal labor laws." *Kreisberg*, 732 F.3d at 141 (quoting *Hoffman*, 247 F.3d at 368).

B. The District Court Correctly Found Reasonable Cause to Believe that PrimeFlight Violated the Act

1. There is strong cause to believe that PrimeFlight is an employer subject to the National Labor Relations Act

a. Principles of Board jurisdiction and the NMB's test for whether a non-airline employer is subject to the RLA

The term "employee" in the Act excludes "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 152(3). Likewise, the term "employer" in the Act excludes "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). The RLA gives the National Mediation Board ("NMB") jurisdiction over a company and its employees when either that company is a common carrier by air or rail as defined in the RLA, or that company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce, referred to as a "derivative carrier." 45 U.S.C. §§ 151, *et seq*. When the company is not directly a carrier, the NMB applies a two-part jurisdictional test to determine whether the company is subject to the RLA as a "derivative carrier." *See Cunningham v. Elec. Data Sys. Corp.*, 579 F. Supp. 2d 538, 541 (S.D.N.Y. 2008). First, it determines whether

the employer is performing traditional carrier-type work, and if so, it next determines whether the employer is owned or controlled by a carrier. *Airway Cleaners, LLC*, 41 NMB 262, 267 (2014).

Although the NMB initially created this test and has issued many of the decisions applying it, the Board has the statutory authority to resolve these jurisdictional matters without referral to the NMB. *UPS, Inc. v. NLRB*, 92 F.3d 1221, 1225 (D.C. Cir. 1996). *Accord Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066, 1072 (6th Cir. 1971). The NMB does not have "primary jurisdiction" over resolving jurisdictional issues, nor is there a hierarchy placing the NMB in front of the NLRB in resolving jurisdictional questions. *UPS*, 92 F.3d at 1225. *See also Spartan Aviation Industries, Inc.*, 337 NLRB 708, 708 (2002) (noting that Board will not refer a case that presents a jurisdictional claim "in a factual situation similar to one in which the NMB has previously declined jurisdiction"). In cases discussing the statutory definition of "employee," the Supreme Court has made clear that Congress tasked the *Board* with construing the Act's definitions. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (citation omitted). The Supreme Court "has consistently declared that in passing the . . . [Act], Congress

intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The Court has admonished the Board to "take care that exemptions from [Board] coverage are not so expansively interpreted as to deny protection to workers the [Act] was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).Furthermore, the Board's expertise in labor relations and its congressionally mandated role in interpreting the Act lend weight to its application, in the labor context, of the NMB's test for whether an employer is controlled by, or under the common control of, a carrier or carriers.

The burden of proving the applicability of the RLA exemption falls on the party asserting it. The applicable rule of statutory construction states that the party claiming the benefit of such an exception must demonstrate its applicability. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948). *Accord United States v. Regenerative Sciences, LLC*, 741 F.3d 1314, 1322 (D.C. Cir. 2014). Specifically, in determining the burden of proof for exemptions to the definition of employee under the Act, the Supreme Court has applied "'the general rule of statutory

construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'" *NLRB v. Ky. River Community Care, Inc.*, 532 U.S. 706, 711 (2001) (quoting *Morton Salt*, 334 U.S. at 44–45). This conclusion is reinforced by the Company's natural advantage in adducing proof as to its operations and contract. *See, e.g., NYU Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998).

Where an employer claims to be a "derivative carrier" under the RLA, the Board will either refer the matter to the NMB, or will itself apply the NMB's two-part test to determine whether the employer is subject to the RLA. *See, e.g.*, *Spartan Aviation*, 337 NLRB at 708. First, the NMB or the Board considers whether the nature of the work performed is the type of work traditionally performed by employees of rail or air carriers. Second, the NMB or the Board determines whether the employer is directly or indirectly controlled by, or under common control with, a carrier or carriers. *See* 45 U.S.C. § 151 (extending RLA jurisdiction to entities that are "directly or indirectly controlled by or under common control" of common carriers). Both parts of the NMB's test must be satisfied for the RLA to cover the employer. *Menzies*

Aviation, Inc., 42 NMB 1, 4–5 (2014); *Airway Cleaners*, 41 NMB at 267; *Air Serv Corp.*, 39 NMB 450, 454–55 (2012).

To determine whether there is carrier control over an employer under the second prong of the test, the NMB looks to several factors, including the extent of the carrier's control over the manner in which the employer conducts its business; its access to the employer's operations and records; the carrier's role in personnel decisions, including hiring, firing, and discipline; the degree of carrier supervision of the employer's employees; its control over employee training; and the extent to which the employer's employees are held out to the public as carrier employees. *See Menzies*, 42 NMB at 5; *Airway Cleaners*, 41 NMB at 268; *Air Serv*, 39 at 456.

In assessing carrier controls, the overall question is whether the carrier or carriers exercise "meaningful control" rather than simply the type of control found in any contract for services. *Bags, Inc.*, 40 NMB 165, 170 (2013); *Aero Port Servs., Inc.*, 40 NMB 139, 143 (2013). Thus, if the carrier exercises control no greater than that exercised in a typical subcontractor relationship, an employer will not be found to fall under the NMB's jurisdiction. *Menzies*, 42 NMB at 6–7; *Airway Cleaners*, 41

NMB at 268. Employer acquiescence to carrier requests in isolated instances, particularly when not required by contract, is not sufficient to establish "jurisdictionally significant control." *Airway Cleaners*, 41 NMB at 268.

Starting in 2012–13, the NMB (and the Board) began placing more reliance on the "meaningful control over personnel decisions" factor in its analysis of the second prong of the test. *See Allied Aviation Service Co. of New Jersey*, 362 NLRB No. 173, slip op. at 1 (Aug. 19, 2015) (citing *Airway Cleaners*, 41 NMB at 268). In particular, the NMB prioritized whether the railway or airline at issue exercises "control over hiring, firing, and/or discipline." *Id*. Notably, the NMB has not characterized this shift in focus as a new test, but rather as simply a different emphasis in application of its old two-part test.[8] *See Airway Cleaners*, 41 NMB at 270 (Hoglander, concurring) (agreeing with result, but arguing that the two-part test should be replaced by a common-law

[8] Recently the D.C. Circuit denied enforcement of a Board decision applying this test. *ABM Onsite Servs. – West, Inc., v. NLRB*, No. 15-1299, 2017 WL 892523 (D.C. Cir. Mar. 7, 2017). However, it did so not based on a rejection of the test, but to remand to the Board for an explanation of what it saw as a departure from the earlier standard. *Id.* at *3 (citing 5 U.S.C. § 706(2)(a)).

agency test); Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course*, 31 ABA J. LAB & EMP. L. 77, 102–03 (2015) (noting that the NMB has never directly overruled or disavowed earlier decisions that focused more on the factor that has to do with carrier control over the manner in which the employer conducts its business).

b. The court correctly determined that PrimeFlight is an employer subject to the Board's jurisdiction

It is undisputed that PrimeFlight's employees at Terminal Five perform work of a nature traditionally performed by air carrier employees. Thus, the first prong for establishing RLA jurisdiction is met. However, the district court correctly concluded that JetBlue does not exert substantial control over PrimeFlight under the NMB's test, and thus, that PrimeFlight is not subject to the RLA, contrary to PrimeFlight's claim. (Br. 37–47.)

As the district court found, the factual similarities between this case and *Bags, Inc.*, 40 NMB at 167–68, where the NMB found no control, are instructive. (SPA 10.) As in *Bags*, PrimeFlight was given office space by the carrier, had to properly staff the terminal based on the carrier's flight schedule, had the carrier monitor its staffing and

procedures to ensure they met contractual specifications, was provided equipment by the carrier, trained employees to the meet carrier guidelines, and had to receive carrier approval for its uniform. The key, in both *Bags* and here, was that the contractor retained control of hiring, firing, and discipline, and that employees were not held out as employees of the carrier.

PrimeFlight's attempt to factually distinguish *Bags* (Br. 42–43) is unavailing. First, PrimeFlight argues that JetBlue provides more of the equipment and space PrimeFlight uses than was provided by the carriers in *Bags*. However, in *Bags* the carrier still provided a significant portion of the equipment: all of the terminal wheelchairs (and most of the airplane aisle wheelchairs), all the curbside check-in equipment, the electric carts, and break rooms were owned by the carriers. 40 NMB at 167. The contractor only owned the baggage carts, handheld computers, two airplane aisle wheelchairs, and some breakroom furniture, *Id.* Given the primacy of control over personnel matters in the NMB's analysis, a marginal difference here between what JetBlue provides PrimeFlight and what the carrier provided in *Bags* should not affect the outcome. (SPA 12.)

Next, PrimeFlight argues that JetBlue "exercises broad, constant influence" over PrimeFlight employees' shifts, schedules, and hours, as well as staffing. (Br. 43.) But the Director presented evidence that PrimeFlight sets employees' schedules and hours (JA 41) and the ALJ agreed. (Add. 9.) While PrimeFlight designs the schedules around JetBlue's flight schedule and staffing minimums, the district court correctly found that such contractual requirements were similar, if even less intrusive than the carrier's control over staffing in *Bags*. (SPA 10.) *See Bags*, 40 NMB at 168.

Finally, PrimeFlight attempts to distinguish *Bags* on the grounds that PrimeFlight employees "interact" with JetBlue supervisors. (Br. 46–47.) This argument fails on two grounds. First, the carrier's supervisors in *Bags* clearly "interacted" with the contractors' employees, otherwise there would have been no reason for them to "bring any issues with Bags' employees to Bag's attention." 40 NMB at 167. Second, the appropriate standard is not whether the carrier's supervisors interact with the contractor's employees, but the degree to which the carrier *supervises* the contractor's employees. *See Menzies*, 42 NMB at 4. Other than a conclusory statement by PrimeFlight's vice

president in his affidavit, there is no evidence in the record that JetBlue directs or supervises PrimeFlight's employees. Employees stated that their supervisors were all PrimeFlight employees. (JA 41, 260.) The contract between PrimeFlight and JetBlue states that PrimeFlight will be "solely responsible for supervision" of its employees. (JA 369.) And the ALJ found that the record failed to establish that JetBlue has the authority to direct the work of PrimeFlight's employees. (Add. 10.) To the extent there is a real factual dispute, the district court properly gave the Director's version of the facts "the benefit of the doubt." *Seeler*, 517 F.2d at 3.

Because the facts of this case are so similar to those of *Bags*, PrimeFlight argues strenuously that the district court improperly relied on recent NMB and Board precedent. (Br. 32–36, 47–48.) PrimeFlight's contention would require the district court, which has no special expertise on Board jurisdictional issues, to disregard current, valid Board precedent. But reliance on applicable precedent cannot constitute an abuse of discretion under the "reasonable cause" test. On the contrary, had the court disregarded current, applicable Board and NMB case law on jurisdiction, and applied its own independent analysis of

the jurisdictional issue, it would have overstepped its role under § 10(j) and committed abuse of discretion.

PrimeFlight's argument that the court gave too much deference to the Director (Br. 29–31) is also unavailing. As the Second Circuit has noted, "some degree of deference is warranted when the Regional Director seeks an injunction under sections 10(j) and 10(*l*)." *Silverman v. 40-41 Realty Assocs., Inc.*, 668 F.2d 678, 681 (1982). In addition, as the Administrative Law Judge's decision shows, the court correctly applied Board and NMB precedent interpreting the Board's jurisdiction.

Moreover, even if the court's deference to the Director's "decision to assert jurisdiction over this case" was erroneous, the choice of *Chevron* deference instead of "reasonable cause" deference was harmless error. *See* 28 U.S.C. § 2111, *Malek v. Fed. Ins. Co.*, 994 F.2d 49, 55 (2d Cir. 1993) (discussing harmless error doctrine). The "reasonable cause" standard is significantly more forgiving than normal deference afforded a final Board order. *Compare Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) *with* *Hoffman*, 247 F.3d at 365 (noting that "we give considerable deference to the NLRB Regional Director"). For instance, under "reasonable cause," the

Director's version of the facts must merely be "given the benefit of the doubt," *Seeler*, 517 F.2d at 3, while the deference afforded to the Board's fact finding under *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), requires a court of appeal to review the whole record, including contradictory evidence or alternative inferences. *Id.* at 487–88. Therefore, even if the district court's choice of standard was erroneous, it did not affect the outcome. *See Overstreet*, 409 F.3d at 1208 (deeming remand unnecessary where district court applied incorrect standard). Accordingly, the district court did not err when it determined that there was reasonable cause to believe that the Board would assert jurisdiction over PrimeFlight.

2. The Director demonstrated strong cause to believe that PrimeFlight is a successor employer, and is thereby obligated to recognize and bargain with the Union

A new employer has an obligation to recognize and bargain with the incumbent union that represented the predecessor's employees when there is "substantial continuity" between the predecessor and successor enterprises and when a majority of the employees in an appropriate bargaining unit had been formerly employed by the predecessor. *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 280–81

(1972). An employer that satisfies this test but refuses to meet its bargaining obligation violates § 8(a)(5).[9] *See id.* at 281. Failure to provide to its employees' bargaining representative requested information that is relevant and necessary to bargaining is also considered a breach of the duty to bargain and a violation of § 8(a)(5) . *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435 (1967).

a. There is substantial continuity between Air Serv and PrimeFlight's operations

The "substantial continuity" test hinges on the totality of the circumstances, including whether there is continuity of the business operation, products or services provided, plant workforce, working conditions, supervision, etc. *See Fall River Dying & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The test focuses on these factors from the employees' perspective, i.e., considering whether they would view their job situation as essentially unchanged despite the change in business

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[9] Section 8(a)(5) (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act (29 U.S.C. § 158(d)) requires "the employer and the representative of its employees to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209–10 (1964) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)).

enterprises. *Fall River*, 482 U.S. at 43 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)).

In the instant case there is ample evidence in the record to support the district court's finding of substantial continuity. As PrimeFlight admitted and the ALJ found in the underlying administrative case, PrimeFlight continued Air Serv's operations in basically unchanged form. (Add. 15.) The transition between the companies was overnight, and as the court noted, over 90% of PrimeFlight's employees in the baggage handling, skycap, and line queue classifications were the same people who had held those positions for Air Serv. (SPA 15.) From the employees' perspective, their jobs remained largely unchanged after PrimeFlight took over. The addition of the wheelchair services category to the bargaining unit does not defeat a finding of substantial continuity, as both the court (SPA 16.) and the ALJ (Add. 15) found. *See Bronx Health Plan*, 326 NLRB 810, 811–12 (1998) (finding that although successor was designed to engage in a completely separate business activity, from the perspective of the employees there were no material changes in their job situations), *enforced mem.*, 203 F.3d 51 (D.C. Cir. 1999) (per curium).

b. The bargaining unit is appropriate

In addition to the substantial continuity between the Air Serv and PrimeFlight operations, the bargaining unit that the Union seeks to represent remains appropriate under PrimeFlight's operations. *See Banknote Corp. of Am., Inc. v. NLRB*, 84 F.3d 637, 642 (2d Cir. 1996) (citing *Burns*, 406 U.S. at 280). Typically, courts will find a bargaining unit appropriate where a successor takes over the predecessor's entire operation and keeps the employees of the unit intact. *Id.* at 650.

PrimeFlight can cite to no case for its contention that adding the wheelchair services "substantially altered" the bargaining unit. (Br. 50.) Without more, "a change in the size of the bargaining unit will not generally destroy the otherwise substantial continuity between the old and new employers." *NLRB v. DeBartelo*, 241 F.3d 207, 212 (2d Cir. 2001). *See also Good N' Fresh Foods*, 287 NLRB 1231, 1231 n.1, 1235–36 (1988) (finding a successor bargaining unit appropriate even though it now included a new job category); *Irwin Industries*, 304 NLRB 78, 80 (1991) (holding that a unit consisting of approximately 337 formerly represented employees and 228 previously unrepresented employees was an appropriate bargaining unit, but denying successorship

obligation on other grounds), *enforcement denied on other grounds sub nom. Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 780 (D.C. Cir. 1992).

In addition, as a single-facility bargaining unit, the wall-to-wall unit is presumptively appropriate, even in the successorship context. *See Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001); *Children's Hospital*, 312 NLRB 920, 928 (1993), *enforced*, 87 F.3d 304 (9th Cir. 1995). Indeed, PrimeFlight does not contest the propriety of a wall-to-wall unit per se. Its challenge to the unit focuses on the inclusion of the wheelchair work, which it incorrectly argues renders the bargaining unit no longer appropriate. *Supra* p. 37. Accordingly, the district court correctly determined that there is reasonable cause to believe that there was substantial continuity between Air Serv and PrimeFlight, and that the bargaining unit remained appropriate. The ALJ's findings further support the judge's decision.

c. PrimeFlight had hired a substantial and representative complement of its employees when the Union requested bargaining

If there is substantial continuity between the predecessor and the successor employer, the union's bargaining demand triggers the

successor's bargaining obligation so long as the employer has hired a "substantial and representative complement" of employees, and a majority of that complement is composed of the predecessor's employees. *See Fall River*, 482 U.S. 47–50.

Here, it is undisputed that when the Union requested recognition and bargaining on May 23, 2016, a majority of PrimeFlight's bargaining unit employees at Terminal Five were former Air Serv employees. And, the district court correctly found that PrimeFlight employed a substantial and representative complement on that date.

In determining whether a "substantial and representative complement" exists at any given time, the Board looks to see whether the job classifications were substantially filled, whether the business was in normal or substantially normal operation, the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work, as well as the relative certainty of the employer's expected expansion. *Fall River*, 482 U.S. at 48–49. For instance, in *Fall River*, the Supreme Court upheld the Board's determination that a substantial and representative complement existed where the employer "had hired employees in

virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement," even though the employer had plans for more hiring. *Id.* at 52.

The facts in this case are not materially different. The district court correctly found that on May 23, PrimeFlight was in full operation, had hired employees in all four of its job classifications, had filled 94% to 100% of the positions in three classifications and 56% in the fourth, and had hired 71% of its eventual full complement. *See Hoffmann*, 247 F.3d 367, 367 n.3 (finding reasonable cause to believe the successor had hired a "substantial and representative complement" where at the time of the bargaining demand the employer had established most but not all of its job categories, and most of those were filled by the predecessor's workforce). *See also NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870–71 (2d Cir. 1981) (dismissing argument that bargaining obligation should wait until successor employer had hired a full complement).

However, PrimeFlight, citing *Myers Custom Products*, 278 NLRB 636 (1986), argues that it had not yet hired a "substantial and representative complement" of employees on May 23, because it had plans to increase its employee complement substantially within a relatively short time. (Br. 49.) PrimeFlight's reliance on *Myers* is unavailing. (Br. 49). In *Myers*, the parties did not dispute that the successor employer had firm plans to double the workforce from thirteen to twenty-five within two months of taking over operations, so the Board held that it was "appropriate to delay determining the bargaining obligation for that short period." *Myers*, 278 NLRB at 637. The Board explicitly distinguished cases where there was no evidence that when the successor "commenced operations it knew how many employees it would need or how long it would take to hire them," *Id.* at 637 n.3 (citing *Pacific Hide & Fur* Depot, 223 NLRB 1029 (1976), *enforcement denied*, 553 F.2d 609 (9th Cir. 1977); *Fall River Dyeing Corp*, 272 NLRB 839 (1984), *enforced*, 775 F.2d 425 (1st Cir. 1985), *aff'd*, 482 U.S. 27 (1987)). Here, the district court correctly rejected PrimeFlight's assertion that prior to May 23 it had concrete plans to hire more employees within a short period of time. (SPA 18.) Other than

the bare assertions of its vice president, PrimeFlight produced *no* contemporaneous evidence that it was planning to hire hundreds of employees at the time the Union requested bargaining, or even that it was contemplating such a plan. Absent evidence of such a concrete timetable, PrimeFlight was not privileged to wait until after it had finished expanding to determine whether it would bargain with the Union. *See Delta Carbonate*, 307 NLRB 118, 118–19 (1992) (finding timetable for anticipated expansion was not so certain as to warrant delay in recognition of union), *enforced mem.* 989 F.2d 486 (3d Cir. 1993). The ALJ also did not credit PrimeFlight's assertion of a pre-existing plan, noting that the vice president's testimony was "conclusionary and vague." (Add. 16.)

Because the court correctly found substantial continuity between Air Serv and PrimeFlight, that the bargaining unit remained appropriate, and that a substantial and representative complement of employees existed on May 23, 2016, the court correctly found that there is reasonable cause to believe that PrimeFlight will be found to be a successor employer.

C. The District Court Properly Concluded that Injunctive Relief is Just and Proper

1. PrimeFlight's violations threaten irreparable harm to employee rights, the collective-bargaining process, and the Board's remedial effectiveness

PrimeFlight's refusal, as a successor employer, to recognize and bargain with the incumbent Union that has been representing unit employees will irreparably undermine employee's support for the Union, deprive them of the benefits of collective bargaining, and render ineffective the Board's final order. Thus, the court's interim order requiring PrimeFlight to recognize and bargain with the Union is just and proper.

Without an interim bargaining order, employees' support for the Union will erode as the Union is unable to protect them or affect their working conditions while the case is pending before the Board. Successorship is an "unsettling transition period" during which the Union is "in a peculiarly vulnerable position." *Fall River*, 482 U.S. at 39–40. PrimeFlight's refusal to bargain with the Union "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Id.* at 49–50 (quoting *Franks Bros. v. NLRB*, 321 U.S. 702, 704 (1944)). Indeed, a successor employer

like PrimeFlight can damage employee confidence in the incumbent Union simply by refusing to recognize it. *Hoffman*, 247 F.3d at 369. Employees' interest in the Union will "wane quickly as working conditions remain apparently unaffected by the union or collective bargaining." *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26–27 (1st Cir. 1986) (quoting *IUEW v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir. 1970)). *See also Small v. Avanti Health Sys.*, 661 F.3d 1180, 1191 (9th Cir. 2011) (acknowledging that a successor's refusal to bargain has long been understood as likely causing an irreparable injury to union representation). In fact, when a successor like PrimeFlight refuses to recognize the incumbent Union, "the same evidence that establishes the Director's likelihood of proving a violation of the NLRA" provides "evidentiary support for a finding of irreparable harm." *Bloedorn*, 276 F.3d at 297–98 (citing *Pye v. Excel Case Ready*, 238 F.3d 69, 74 (1st Cir. 2001)).

PrimeFlight's refusal to recognize and bargain with its employees' chosen representative has already begun to affect employee support. As the court found, there is evidence that PrimeFlight's conduct has had a chilling effect on employees speaking to Union representatives,

attending meetings, and voicing support for the Union in any meaningful way. (SPA 21.) In addition, the frustrating effect of PrimeFlight's delay in bargaining is amplified by employees' concern that PrimeFlight could lose the contract, starting the process all over again. PrimeFlight's contention (Br. 56–57) that any loss of support must have occurred under the predecessor is entirely speculative and contradicted by the evidence. Attendance at Union meetings collapsed *after* PrimeFlight's intransigence. (JA 285–87.) Employees who were active in Union rallies and activities shortly after PrimeFlight took over have now abandoned their efforts. (JA 284–85, 287.) In sum, the district court correctly found that PrimeFlight's activities were chilling employees from participating in Union activities and eroding their Union support. (SPA 21.)

This loss of the Union's support cannot be restored by a final Board order in the absence of the court's injunction, because by then it will be too late. PrimeFlight will have "weaken[ed] severely, if not destroy[ed], the power of the predecessor's employees to assert their collective bargaining rights." *Hoffman*, 247 F.3d at 369. *See also Small*, 661 F.3d at 1192 (finding that successor employer's delay in bargaining

weakens support for the union, and a Board order cannot remedy this diminished level of support). The longer the Union is kept from working on behalf of PrimeFlight's employees the less likely it is to be able to organize and represent those employees effectively if and when the Board orders the company to commence bargaining. *Bloedorn*, 276 F.3d at 299. Employees will shun the Union or have little reason to support it, since as one employee put it, "if nothing changes, then why do it?" "When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees." *I.U.O.E. v. NLRB (Tiidee Prods.)*, 426 F.2d 1243, 1249 (D.C. Cir. 1970).

Union loss of support, in turn, will make the Board's final bargaining order meaningless. The Union needs the support of PrimeFlight's employees in order to bargain effectively. *See Small*, 661 F.3d at 1193. Without that support, the Union will have no leverage and will be hard-pressed to secure improvements in wages and benefits at the bargaining table. *Moore-Duncan v. Horizon House*, 155 F. Supp. 2d 390, 396–97 (E.D. Pa. 2001). *See also Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 998 (7th Cir. 2000) ("By undermining support for

the union, the employer positions himself to stiffen his demands . . . knowing that if the process breaks down the union may be unable to muster enough votes to call a strike."). Weakening of the Union over time increases the difficulty of recreating a lawful bargaining relationship, such that no effective collective bargaining will occur when the Board issues its final order. *See Small*, 661 F.3d at 1192–93. There is a real danger that employee support will erode to such an extent that the Union could no longer effectively represent these employees. *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221, 1226–27 (6th Cir. 1993). Thus, PrimeFlight will have succeeded in defeating the Union, eluding its bargaining obligation, and frustrating the intent of Congress by virtue of its unlawful actions. *See* 29 U.S.C. § 151 ("encouraging the practice and procedure of collective bargaining" is "the policy of the United States"); 29 U.S.C. § 157 (employees have the right "to bargain collectively through representatives of their own choosing"). PrimeFlight's claim that a decline in Union support poses no immediate threat to the Union's future representation under a Board order (Br. 58) ignores this ample precedent recognizing the threat of remedial failure from diminishing Union support over time.

The district court correctly understood that an interim bargaining order offers the best chance of preserving the Union's support, protecting employee rights, and maintaining the Board's remedial authority. *See Scott v. Stephen Dunn*, 241 F.3d 652, 669 (9th Cir. 2001), *abrogated on other grounds as recognized in McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010). An interim bargaining order also ensures that employees retain the current benefits of their choice of Union representation. The benefits of Union representation include bargained-for improvements in terms and conditions of employment, such as higher wages or benefits packages. A final Board bargaining order is prospective and will not compensate for the benefits that the Union might have secured through bargaining in the present. *See Small*, 661 F.3d at 1191–92; *Bloedorn*, 276 F.3d at 299.

The benefits of representation also reach beyond wages and fringe benefits to nonmonetary benefits such as job security through seniority, layoff, and recall provisions, protection against arbitrary employment actions through a grievance procedure, and freedom from unilateral changes in working conditions. These nonmonetary benefits are an important part of collective-bargaining rights under the Act, even if

they are not materially quantifiable. *See Hoffman*, 247 F.3d at 369 n.6. Indeed, the fact that losses of such benefits are unquantifiable makes them irremediable by a final Board order. *See Levine v. C & W Mining Co.*, 465 F. Supp. 690, 694 (N.D. Ohio 1979), *aff'd in rel. part*, 610 F.2d 432 (6th Cir. 1979). *See also Stephen Dunn*, 241 F.3d at 667 ("The value of the right to . . . representation is immeasurable in dollar terms."). An interim bargaining order prevents these ongoing losses and fulfills the interest recognized by the Supreme Court that a successor's employees be represented as soon as possible. *Fall River*, 482 U.S. at 49.

Finally, courts have recognized that the overriding policy of the Act is industrial peace, and the obligation of collective bargaining is the primary means fashioned by Congress for securing industrial peace. *See DeProspero v. House of the Good Samaritan*, 474 F. Supp. 552, 557, 559 (N.D.N.Y. 1978); *Small*, 661 F.3d at 1192 (citing *Fall River*, 482 U.S. at 38–39; *Tiidee*, 426 F.2d at 1249). As § 1 of the Act states, "the refusal by some employers to accept the procedure of collective bargaining leads to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce." 29 U.S.C. § 151. PrimeFlight's failure to bargain in good faith threatens

industrial peace, and the Board cannot fashion a retroactive remedy for the harm to industrial peace that occurs during the period that the employer refuses to bargain. *Small*, 661 F.3d at 1192.

PrimeFlight's contention (Br. 56) that a bargaining order does not restore the status quo in the successor context ignores years of court precedent. For support, PrimeFlight cites (Br. 54–55) *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975), which predated the Supreme Court's decision in *Fall River*, 482 U.S. at 49, and declined to follow the Second Circuit's understanding of the status quo as then articulated in *Seeler*, 517 F.2d at 38–39. *See also Hoffman*, 247 F.3d at 369. As the Ninth Circuit noted, the *Boire* court "erroneously identified the status quo to be preserved," and thus actually "hinders rather than protects the collective bargaining process." *Steven Dunn*, 241 F.3d at 660. The relevant status quo to be afforded protection in a successor case is that of the employees' representation by the incumbent Union. *See*, *e.g.*, *Bloedorn*, 276 F.3d at 278, 300–01 (holding that interim hiring of employees and recognition of incumbent union halts "progression away from the status quo ante," even though the employees had been terminated by the predecessor); *Scott v. El Farra Enters., Inc.*, 863 F.2d

670, 676–77 (9th Cir. 1988) (holding that court abused its discretion by failing to order interim hiring and recognition by successor). Courts, including the Second Circuit, have long recognized the need for interim bargaining orders where a successor employer improperly refuses to bargain with the incumbent union. *See Hoffman*, 247 F.3d at 369 (Second Circuit); *Frye*, 10 F.3d at 1226–27 (Sixth Circuit); *Bloedorn*, 276 F.3d at 299 (Seventh Circuit); *Small*, 661 F.3d at 1191–94 (Ninth Circuit); *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 102–03 (3d Cir. 2011); *El Farra Enters.*, 863 F.2d at 676–77 (Ninth Circuit); *Asseo v. Centro Medico Del Turabo, Inc.*, 900 F.2d 445, 454–55 (1st Cir. 1990). The Second Circuit in *Hoffman* specifically noted that an interim bargaining order against a successor employer is necessary to restore the status quo. 247 F.3d at 369.

PrimeFlight's reliance on *Harrell v. Ridgewood Health Care Ctr., Inc.*, 154 F. Supp. 3d 1258 (N.D. Ala. 2015) is also unavailing. (Br. 59.) Aside from being a non-precedential district court decision from another circuit, *Harrell* is also factually dissimilar to the case at hand. The court in *Harrell* found no evidence that the employer's refusal to bargain was negatively affecting union support, 154 F. Supp. 3d at 1277. Here,

however, the district court correctly recognized the significant evidence in the record showing the chilling effect of PrimeFlight's actions. (SPA 21; JA 274–75, 279–80, 283–88.) In addition, the court in *Harrell* dismissed without discussion the Supreme Court's acknowledgment of the many significant harms inherently caused by a successor employer's refusal to bargain." *Fall River* at 39–40, 49–50 (quoting *Franks Bros.*, 321 U.S. at 704). *See also Hoffman*, 247 F.3d at 369 (Second Circuit). Accordingly, *Harrell* has little utility in the case at hand.

In comparison to the serious threatened irreparable harm described, an interim bargaining order does not pose any undue burden on PrimeFlight. "There is nothing permanent in a bargaining order." *Seeler*, 517 F.2d at 40 (quoting *NLRB v. Gissel Packing*, 395 U.S. 575, 613 (1969)). PrimeFlight's only obligation is to recognize and bargain with the Union in good faith or to a bona fide impasse. The order does not compel PrimeFlight's agreement to any particular term or condition of employment advanced by the Union. *Id.* at 40; 29 U.S.C. § 158(d). *See also H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Further, any agreement reached by the parties under the court order will, by the terms of the injunction, be null and void should the Board decline

jurisdiction or dismiss the complaint allegations on the merits. And, in any case, any contract agreed to by the parties can contain a conditions subsequent to take into account the possibility, low in this case, that the Board will not grant a final bargaining order remedy. *See Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1054 (2d Cir. 1980); *Pan Am. Grain*, 805 F.2d at 28. Accordingly, the court's determination that injunctive relief is just and proper was not an abuse of discretion, and should be sustained.

D. The District Court Abused its Discretion by Precluding the Parties from Bargaining About Staffing Levels

Despite correctly understanding the need for an injunction requiring PrimeFlight to bargain with the Union during the pendency of the Board's administrative proceeding, the district court abused its discretion by prohibiting the parties from bargaining about staffing levels. This restriction places the Union in an untenable position in bargaining. It forces the Union to concede to PrimeFlight the sole discretion to determine this vital term and condition of employment that should be determined through the collective-bargaining process, a process which is well-designed to ensure that an employer does not have

to concede to staffing proposals that are inconsistent with the needs of its customer.

1. The district court's order prohibiting bargaining or agreement about staffing levels ignores Congressional policy favoring the parties' freedom of contract

Under §§ 8(a)(5) and 8(b)(3), it is unlawful for a unionized employer or a labor organization representing its employees to refuse to bargain collectively. 29 U.S.C. §§ 158 (a)(5) & (b)(3). Congress defined "bargain collectively" to mean, *inter alia*, to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Staffing, scheduling, and hours are all considered "terms and conditions of employment." *See, e.g.*, *Sunrise Mountainview Hosp.*, 357 NLRB 1406, 1410 (2011) (holding that staffing levels of on-call and backup nurses per shift is a mandatory subject of bargaining).

Congress further stated that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." *Id.* In *H.K. Porter Co.*, 397 U.S. at 108, the Supreme Court explained that the fundamental premise on which the Act is based is the concept of "private bargaining under governmental supervision of

the *procedure alone*, without any official compulsion of the actual terms of the contract." (emphasis added).

The district court's prohibition on bargaining about staffing levels, and statement that Primeflight "will [unilaterally] determine the shifts and staffing levels," forces the Union to concede to PrimeFlight the unilateral right to control this key term and condition of employment. By compelling the parties to agree to terms or conditions of employment, the district court contradicts a fundamental premise of the Act. *See id.* As the Supreme Court noted in *H.K. Porter*, Congress has determined that parties should not be required to agree to any substantive topics of bargaining, as doing so would infringe on their freedom of contract. *Id.* The government can only supervise the process. *Id.*

It is for this reason that the court's reliance on *Blyer v. One Stop Kosher Supermarket, Inc.*, 720 F. Supp. 2d 221(E.D.N.Y. 2010), is misplaced. In that case, the district court ordered interim bargaining, but on the condition that any agreement could not be implemented until the Board rendered its final decision. *Id.* at 228. Ordering parties to meet, bargain, or implement or void agreements are procedural orders

that the Board and courts regularly issue, and are perfectly consistent with Congress' policy of regulating the *process* of bargaining. *See, e.g.*, *NLRB v. Local 554, Graphic Comms. Int'l Union*, 991 F.2d 1302, 1305–06 (7th Cir. 1993) (ordering union to sign contract it had agreed to); *Dist. Council of Painters No. 8*, 326 NLRB 1074, 1074 (1998) (ordering union to rescind collective-bargaining agreements it had unlawfully signed). Notably, the court's order in *Blyer* did not seek in any way to dictate the substance of negotiations, only the time when the fruit of those negotiations would take effect.

2. The district court could not rely on its equitable powers to override Congressional policy favoring the parties' freedom of contract

In addition to ignoring Congressional policy about intervening in the substance of negotiations, the court also misapplied its equitable powers. The district court prohibited bargaining on staffing because, in its judgment, "PrimeFlight should not have to pay for the same number of employees on Groundhog Day as it does in the days before Thanksgiving." (SPA 31.) Thus, the court concluded that requiring PrimeFlight to bargain about staffing would be "unjust." Yet, in determining that the law's requirement to discuss this topic was

"unjust," the court improperly passed judgment on the law itself, instead of on whether injunctive relief was appropriate to enforce the law.

When acting in equity, courts have broad discretion to "mould [sic] each decree to the necessities of a particular case." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Indeed, conditional or partial interim remedies are not uncommon in the § 10(j) context. *See, e.g.*, *Mattina v. Kingsbridge Heights Rehab. & Care Ctr.*, 329 F. App'x 319, 323 (2d Cir. 2009) (finding conditional reinstatement proper); *Morio v. N. Am. Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980) (per curium) (voiding parts, but not all, of individual contracts made while employer refused to bargain with union). However, Congress may, either explicitly or through necessary inference from a statute, intervene and guide or control the exercise of the courts' equitable discretion. *Weinberger*, 456 U.S. at 313 (quoting *Hecht*, 321 U.S. at 329). "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Armstrong v. Exceptional Child Ctrs., Inc.*, 135 S. Ct. 1378, 1385 (2015). *See also I.N.S. v. Pangilinan*,

486 U.S. 875, 883 (1988) (noting that equitable remedies cannot be invoked to override a "public policy established by Congress"). In more venerable terms, courts abide by the maxim that "equity follows the law." *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893).

This is especially true when the court is sitting in equity to enforce a statute. "[L]egislative provisions calling for equitable relief to prevent violations of a statute require the courts to act in accordance with traditional equity practice, 'as conditioned by the necessities of public interest which Congress has sought to protect.'" *Morio*, 632 F.2d at 218 (quoting *Seeler*, 517 F.2d at 39–40). For instance, in *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 486–87 (2001), the United States sued to enjoin a medical cannabis dispensary from distributing marijuana in violation of the Controlled Substances Act ("CSA"), 21 U.S.C. § 841(a). *See* 21 U.S.C. § 882(a) (vesting district courts with jurisdiction to enjoin violations of the CSA). The dispensary asked for an exception to the injunction, arguing that some marijuana distributions were medically necessary, and that the court sitting in equity should balance "human suffering" against the statute, but the district court ruled that it could not. *Oakland Cannabis*, 532 U.S. at

487–88. The Ninth Circuit reversed, holding that courts have "broad equitable discretion," and could have and should have considered factors such as the serious harm in depriving patients of marijuana. *Id.* at 488. The Supreme Court, however, found that while the district court has broad powers in equity, it cannot "consider any and all factors that might relate to the public interest or the conveniences of the parties." *Id.* at 497. Instead, the Court ruled that a court sitting in equity to enforce a statute cannot "ignore the judgment of Congress, deliberately expressed" in the law. *Id.* at 497 (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937)). "A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. . . . [or] reject the balance that Congress has struck in a statute." *Id.* (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)). Because Congress had determined by statute that marijuana has no medical benefits, and because the CSA's broad prohibition had no medical exception, the district court could not consider harm to patients in fashioning its injunction. *Id.* at 498–99.

Similarly, here, the district court abused its discretion by overriding Congress' requirement that parties in a collective-bargaining

relationship confer in good faith with each other with respect to wages, hours, and other terms and conditions of employment. Once the court determined that interim bargaining was necessary, the contours of its order were constrained "by the necessities of public interest which Congress has sought to protect," *Morio*, 632 F.2d at 218 (quoting *Seeler*, 517 F.2d at 39–40), which favors "private bargaining . . . without any official compulsion of the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. at 108 (emphasis added).

3. Even if the Act allows equitable intervention in the substance of bargaining, the harm the Order's limitation is meant to address is unsupported

The district court misinterpreted the nature of a bargaining obligation when, in balancing the equities, it determined that ordering bargaining about staffing would be unjust. As the court noted in its order denying the Director's Rule 59(e) motion, "it seems unjust to me to permit the Union to dictate staffing levels over the needs of JetBlue." (SPA 31.) However, as noted above, simply because a party has a bargaining obligation does not mean it is obliged to agree to any terms. *See H.K. Porter*, 397 U.S. at 108. Allowing the parties to bargain over all terms and conditions of employment, including staffing levels, would

not necessarily result in the Union "dictating" anything. The Union would be free to make proposals about staffing levels and PrimeFlight would be free to reject them, counterpropose, offer other concessions in exchange for greater control over staffing levels, or wield lawful economic weapons to strengthen its opposition. An unrestricted bargaining order allows for the free back and forth of negotiations envisioned by Congress and does not predetermine any outcome, much less one that would be harmful to PrimeFlight or its customers. If PrimeFlight has legitimate reasons to maintain complete discretion over staffing levels, it is well within its rights to insist on it to the point of impasse, so long as it does so in good faith and not with the purpose to frustrate agreement.

In addition, while addressing a perceived, unsupported harm to PrimeFlight, the court's restriction on bargaining ignored the actual harm it did the Union. The forced concession on shifts and staffing unfairly swings the balance of bargaining power toward PrimeFlight by prohibiting the Union from raising a subject of major concern to employees. As multiple employees noted, there is deep dissatisfaction about scheduling. (JA 275, 284.) Staffing and scheduling are deeply

intertwined, since employees' schedules depend on whether they are called to work that day or not. The Union's inability to discuss shifts or staffing will make it difficult, if not impossible to bargain about scheduling. (JA 470–72.)

In the end, the court's order forbidding bargaining or agreement over an important, mandatory subject of bargaining works to the detriment of both parties. If the Union attempts to bargain over staffing levels, as it has the right to under Board law, it potentially exposes itself to allegations of contempt of the court order. If PrimeFlight refuses to bargain over those proposals, per the terms of the court's order, it risks being prosecuted under the Act for bargaining in bad faith.

Thus, when fashioning its order the district court failed to properly balance the equities.

E. The Court Abused its Discretion by Not Including a Cease and Desist Order in the Injunction

Under § 10(c) of the Act, if the Board determines that a party has violated the Act, then it "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action . . . as will effectuate the policies of this Act." 29 U.S.C. § 160(c). That is, the Board

is required by the statute to order a party to cease and desist. In *NLRB v. Express Pub. Co.*, 312 U.S. 426, 438 (1941), the Supreme Court, in rejecting an overbroad cease and desist order, found that in the case of a refusal to bargain, "[a]n appropriate order . . . would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the [union's] efforts to negotiate."

Although the Act only requires that the Board issue cease and desist orders, as discussed above courts sitting in equity to enforce a statute should be guided by the policies enshrined therein. *See Morio*, 632 F.2d at 218. Moreover, the failure to issue an interim cease and desist order in this case, and thereby preserve the status quo from additional violations that do not technically violate the order's affirmative provisions, seriously undercuts the effectiveness of the injunctive order. Given the court's reasonable cause and just and proper findings, it was an abuse of discretion to fail to include such an order in the injunction.

STATEMENT REGARDING ORAL ARGUMENT

Because the case involves relatively novel issues relating to a court's equitable power enforcing the National Labor Relations Act, the

Board believes that oral argument may assist the Court, and that the standard twenty minutes per side is sufficient.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the district court's grant of interim relief, but direct the court to alter the order to no longer prevent bargaining or agreement on staffing, and to add appropriate cease and desist language.

Respectfully submitted,

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March 22, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of 16,500 words set forth in Fed. R. App. P. 28.1.1(b), because this brief contains 12,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2013 in proportionally spaced, 14-point Century Schoolbook.

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Dated at Washington, D.C.
this 22d day of March 2017

Addendum

ADDENDUM
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JD(NY)-05-17
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PRIMEFLIGHT AVIATION SERVICES, INC.

and

Case 29–CA–177992
29–CA–179767
29–CA–184505

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 32BJ

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for the Charging Party.

DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge, Based upon charges filed by Service Employees International Union, Local 32BJ (Charging Party or Union) against PrimeFlight Aviation Services, Inc. (PrimeFlight, Respondent or the Employer) an order consolidating cases, amended consolidated complaint and notice of hearing (complaint) issued in the above-referenced matter. The complaint alleges that Respondent, a *Burns*,[1] successor, has refused to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act and, as a result, has (1) failed to provide information that is necessary and relevant to collective bargaining; (2) unilaterally changed employees' terms and conditions of employment without providing the Union with notice and an opportunity to bargain by (a) deducting pay from employees' paychecks to account for unpaid break time and (b) by changing employee work schedules as discussed below.

The complaint further alleges that Respondent has violated Section 8(a)(1) of the Act by requiring its employees to sign, as a condition of employment, an unlawful arbitration agreement [2]

[1] See *NLRB v. Burns Security Services,* 406 U.S. 272 (1972).

[2] On February 10, 2017, Respondent filed a Motion to Partially Stay my ruling with regard to this paragraph and related allegations of the complaint. The basis for such a motion is that the Supreme

Continued

and that in June 2016, a supervisor of Respondent threatened employees with discharge because they engaged in activities in support of the Union.

Respondent filed an answer denying the material allegations of the complaint arguing that PrimeFlight is outside the jurisdiction of the National Labor Relations Board for unfair labor practice proceedings because it is a "derivative carrier" under the Railway Labor Act and moreover, that PrimeFlight is not a *Burns* successor because an analysis of PrimeFlight's full complement of employees demonstrates that predecessor employees comprise less than 40 percent of the appropriate unit.

The hearing in this matter was held before me on October 18, 19, and 20, 2016.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

Findings of Fact

Jurisdiction and Labor Organization Status

Commerce Facts

Respondent has admitted those aspects of the complaint which allege basic commerce jurisdiction. Thus, the record establishes, and I find that at all material times, Respondent has been a domestic corporation with its principal office and place of business located at 7135 Charlotte Pike, Suite 100, Nashville, Tennessee, and has places of business located at airports nationwide, including a place of business located at John F. Kennedy International Airport (JFK Airport) in Queens, New York. In the course and conduct of its business operations and has been engaged in the business of providing airport terminal services, including baggage handling, skycap services, checkpoint services, and wheelchair assistance to JetBlue Airways Corp. (JetBlue) at JFK Airport.

It is further admitted that based upon a projection of its operations since May 9, 2016, at which time Respondent commenced its operations at JFK Airport, Respondent will annually provide services valued in excess of $50,000 for JebBlue, an entity which is directly engaged in commerce. It is also admitted, and I find that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

The issue of whether Respondent is subject to the jurisdiction of the NLRB, thereby rendering it an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act is a preliminary question to consider and decide prior to a determination of whether PrimeFlight committed any of the unfair labor practices alleged in the complaint.

Court has granted certiorari for cases which raise, among other things, the issue of whether arbitration agreements which bar employees from pursuing work-related claims on a collective or class basis in any forum are violative of the Act. The Charging Party opposed this motion. However, the General Counsel has taken the position that it does not oppose Respondent's motion and, furthermore, has moved to have the relevant parapraphs of the complaint severed and a ruling on these allegations held in abeyance. Based upon the motion of the General Counsel, concurred with by the Respondent, I issued an order on February 28, 2017, ordering that the allegations relating to paragraph 10 of the complaint be severed and held in abeyance pending further decision of the Court or the Board. Accordingly, I will not discuss them further here.

The NLRB has Jurisdiction over PrimeFlight's Employees at Terminal 5 at JFK Airport

Background

JetBlue operates out of terminal 5 at JFK Airport. JetBlue offers certain services to its customers through independent contractors such as baggage handling, skycap, checkpoint, and wheelchair services. Prior to May 9, 2016, when PrimeFlight commenced providing services for JetBlue, an independent contractor known as Air Serv performed the baggage handling, skycap, and checkpoint services. Another contractor, PAX Assist, performed the wheelchair services.

On March 25, 2015, Air Serv and the Union entered into a recognition agreement which states that based upon a card check performed by an arbitrator, the Union "has demonstrated majority support among the full-time and regular part-time employees [excluding statutory exceptions]" employed by Air Serve at Newark Liberty, John F. Kennedy International, and LaGurardia Airports. The agreement does not specify which job titles are to be included in the bargaining unit.

In March 2016, PrimeFlight successfully bid on a contract with JetBlue under which it agreed to provide all four types of terminal services in the JFK terminal 5 beginning on May 9, 2016. This relationship was memorialized by two documents: a "General Terms Agreement" (GTO) and a "Statement of Work" (SOW). In particular, PrimeFlight agreed to provide wheelchair, line queue, baggage handling, and skycap services commencing on May 9. These matters will be discussed in further detail below.

Jurisdictional Analysis

Applicable Legal Standards

The protections of the Act extend to those workers who qualify as employees under Section 2(3) of the Act. The term "employee" as defined in the Act, does not include "any individual employed by an employer subject to the Railway Labor Act." Instead the Railway Labor Act (RLA) confers jurisdiction to the National Mediation Board (NMB) when that company is either a common carrier by air or rail as defined in the RLA, or that company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce, referred to as a "derivative carrier."

Historically, when the National Labor Relations Board receives a petition or an unfair labor practice charge involving employees who work at an airline terminal or facility, and where a party contends that the NMB has jurisdiction, the NLRB will often request a ruling from the other agency before proceeding further. And, if the NMB decides that the employer is or is not subject to the Railway Labor Act, the NLRB will typically defer to such ruling. *DHL Worldwide Express*, 340 NLRB 1034 (2003). See also, *Primeflight Aviation Services*, 353 NLRB 467 (2008).[3]

[3] In *Primeflight*, supra, the contractor performed skycap, wheelchair, baggage, priority parcel, ticket verification, and passenger services for various airlines at LaGuardia Airport. (That is, essentially the same type of services that PrimeFlight provides in this case). The Board requested the NMB to review the record in the representation case and that agency subsequently issued its opinion that the employer was subject to the Railway Labor Act. Considering the record in light of the NMB opinion, the Board dismissed the petition on the basis that the employer was subject to the Railway Labor Act.

Nevertheless, the NLRB is not required to refer a case to the NMB. In *Spartan Aviation Industries*, 337 NLRB 708 (2002), the Board stated:

> When a party raises a claim of arguable jurisdiction under the RLA, the Board generally refers the case to the National Mediation Board (NMB) for an advisory opinion. However, there is no statutory requirement that the Board first submit a case to the NMB for an opinion prior to determining whether to assert jurisdiction. *United Parcel Service*, 318 NLRB 778, 780 (1995). Although the Board generally makes such referrals, it will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction. See, e.g., *Phoenix Systems & Technologies, Inc*., 321 NLRB 1166 (1996); *E.W. Wiggins Airways, Inc*., 210 NLRB 996 (1974).

In determining whether the NLRB has jurisdiction, it has essentially adopted the same jurisdictional test as the NMB. In recent cases, a majority of the NMB, has reiterated this test as set forth in *Airway Cleaners LLC*, 41 NMB 262, 267–269 (2014) and *Air Serv Corp.*, 39 NMB 450, 459 (2012).

In *Air Serv*, the NMB discussed a two-part test. First, whether the nature of the work is that which has been traditionally performed by employees of rail or air carriers. And second, whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers. Both criteria must be met in order for the NMB to assert jurisdiction.

As to the second part of the test, the majority opinion of the NMB was that:

> In applying the second part of its jurisdictional test, the Board looks for evidence of whether a material degree of control exists between the carrier and the employer in question for the latter to be deemed a carrier. Significant factors include: (1) Whether the entity's employees are supervised by the carrier; (2) whether the employees of the entity . . . act as the carriers' agents; (3) whether carrier officials have the ability to make effective recommendations regarding the hiring and firing of the entity's employees; (4) whether the entity . . . uses equipment owned by the carrier to perform its duties; (5) whether the carrier has a significant degree of control over the training of the entity's employees, and (6) whether the entity performs work for more than one company and retains control over its operations.

There, based upon the foregoing standards, the NMB declined to assert jurisdiction over a contractor that provided shuttle bus transportation services between airport parking areas and terminal buildings.

In *Airway Cleaners,* supra at 267–269, the NMB, by majority vote, held that the employer, in relation to its performance of services at LaGuardia Airport, which consisted of cleaning and maintenance services, was not within its jurisdiction. The majority opinion stated, inter alia;

> To determine whether there is carrier control over a company, the NMB looks at several factors, including the extent of the carrier's control over the manner in which the company conducts its business, access to the company's operations and records, role in personnel decisions, degree of supervision of the company's employees, whether employees are held out to the public as carrier employees, and control over employee training.

> As discussed in prior cases, where the Board has not found jurisdiction, a carrier must exercise "meaningful control over personnel decisions," and not just the type of contract found in any contract for services . . . the contract provisions at issue here are similar to those in Bags. (*Bags Inc.*, 40 NMB 165, 170 (2013)). In that case carriers provided training to a Bags' employee, who in turn trained other employees. The carriers provided equipment to Bags, had the right to bar employees from the airport if they did not comply with safety or other standards and reported employee misconduct to Bags. These examples of control were not sufficient to establish RLA jurisdiction.

In *Menzies Aviation Inc.,* 42 NMB 1 (2014), the NMB concluded that an employer that provided baggage, ramp, and aircraft servicing functions, mostly for Alaska Airlines at Seattle Airport, was not subject to the jurisdiction of the NMB. The majority opinion stated:

> The evidence . . . demonstrates that carriers at SeaTac do not exercise a sufficient amount of control over Menzies . . . [The] contract describes a typical relationship between a carrier and a contractor. The fact that Alaska dictates standards for work performed is not unusual in a contract for services and does not evidence a significant degree of control over Menzies' operations. All contracts specify certain standards that a company must follow in performing services for a carrier. For example, in *Bags, Inc.*, 40 NMB at 1666 –1667, the company had to follow the standard practice of Delta and Delta had the right to bar an employee from the airport if he or she did not comply with Delta's appearance or safety standards. . . .
>
> Likewise, the fact that Alaska auditors inspect work performance does not establish this type of control. A Menzies employee reported that Alaska managers may directly notify a Menzies employee of a small infraction but performance problems are reported to and all discipline is handled by Menzies management. The contract between Menzies and Alaska provides that Menzies "shall not be required by Alaska to terminate or discipline any of its own employees in breach of laws or (Menzie's) employee disciplinary processes as set out in its employee handbook." So while Alaska may report performance problems, Menzies determines the appropriate discipline following it's own discipline process. . . .
>
> Menzies further argues that Alaska's authority to require it to remove from Alaska's operations employees who it finds unacceptable, evidences the required control for RLA jurisdiction . . . Menzies is not required to terminate employees who are unacceptable to Alaska . . . The NMB has found jurisdiction based on the authority to remove employees where an employee has been terminated following a carrier request that he or she be removed from the contract. . . . That is not the case here; Menzies retains and exercises the option to utilize employees elsewhere at SeaTac.
>
> While the Board has in the past found jurisdiction over Menzies' operations at other locations, jurisdiction decisions are presented to the Board on a case-by-case basis at different locations where companies contract with direct carriers who exercise various degrees of control . . .
>
> The extent to which the carrier controls the manner in which Menzies conducts its business is not greater than found in a typical subcontractor relationship. As in the Board's recent *Airways Cleaners* decisions, Alaska does not exercise "meaningful control over personnel decision." Alaska does not hire, fire or routinely discipline Menzies employees. Contract provisions even more explicitly leave these decisions

to Menzies. Menzies has its own discipline policy and, although Alaska managers can report misconduct or failure to follow procedures, Menzies has the authority to discipline as its managers see fit.

In *Bags, Inc*. 40 NMB 165, 169 (2013), discussed in *Menzies*, supra, the NMB declined to assert jurisdiction over a contractor that provided skycap, wheelchair and unaccompanied minor services to airlines.

Contentions of the Parties

The General Counsel maintains that foregoing cases represent a "shift" in the assertion of NMB jurisdiction in recent years, which ceded to the Board jurisdiction over airline contractors. In further support of this contention, the General Counsel cites to *Primeflight Aviation Services, Inc*., Case 12-RC-113687 (2015) WL 3814049, slip op. at 1 fn. 1 (2015), where the Board denied the respondent's Request for Review of the Regional Director's determination that the Board had jurisdiction. In particular, Member Johnson acknowledged that "these cases represent a shift by the NMB from earlier opinions in which it had asserted jurisdiction on similar grounds, and this view is currently extant NMB law."

Having recognized that the NMB will decline jurisdiction over airline contractors, the Board now affirmatively takes the position that it will assert jurisdiction in such cases, absent evidence that an airline exercises greater control over the contractor than is present in a "typical subcontractor relationship." *Allied Aviation Service Co*., 362 NLRB No. 173, slip op. at 2 (2015). There, the Board asserted jurisdiction over contractor that provided fueling services to airlines, and granted summary judgment where the contractor refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

PrimeFlight maintains that it is outside the jurisdiction of the National Labor Relations Board because it is a "derivative carrier" within the meaning of the Railway Labor Act. Specifically, Respondent maintains that PrimeFlight's operations satisfy the "function" aspect of the test, because PrimeFlight's employees perform work which has been traditionally performed by carrier employees. An examination of various NMB opinions shows that the services performed at terminal 5 fall within the scope of those services recognized as traditional airline craft and class functions.

Respondent further argues that PrimeFlight's JFK operations satisfy the "control" aspect of the derivative carrier test under the RLA. General Counsel and the Union dispute the foregoing contentions.

Respondent contends that JetBlue has involvement in the hiring, firing, and disciplinary decisions of PrimeFlight employees. In support of the foregoing contentions, Respondent relies upon section 7.6 of the GTA which provides as follows:

> Business Partner [PrimeFlight] shall enforce (and, if applicable, cause its subcontractors to enforce) strict discipline and good order among its employees, to maintain and observe sound and harmonious labor practices, and to take all reasonble steps to avoid labor disputes (including but not limited to jurisdictional and other site specific labor disputes) and work stoppages. If, at any time any of the workers performing the Services shall be unable to work in harmony or shall interfere with any labor employed by JetBlue or any tenant of the area in which the Services are performed, Business Partner shall take reasonable steps as shall be

necessary to resolve such dispute including but not limited to the removal and replacement of employees or agents.

In furtherance of the above noted contentions, Respondent further relies upon the testimony of Division Vice President Matthew Barry as follows:

> Q: [by respondent's counsel]: With respect to JFK and JetBlue. If they ask you to remove an employee, what would your response be?
>
> A: My understanding is, per our general terms agreement, contract with them, if they were to request it then I would have to abide.

Barry essentially reiterated such claims during his cross-examination and further stated that it was section 7.6 of the GTA, set forth above, that establishes such a requirement.[4]

Respondent further points to certain other obligations set forth in the GTA in support of its contention that PrimeFlight operates its business at JFK under the close control of JetBlue. In particular, Respondent notes that PrimeFlight's employees work entirely within a physical space controlled by JetBlue when performing their duties to support JetBlue's airline operations; PrimeFlight employees are trained on JetBlue training modules regarding the airline's policies and procedures including "Train the Trainer" training, initial curriculum training and backup processes should malfunctions occur. Additionally, JetBlue provides equipment used at JFK including wheelchairs, baggage carts, tablets, radios, computers, and telephones as well as internet service and other software or technology platforms as necessary. Skycap employees use JetBlue's computer system to check in customers, issue seat assignments, issue boarding passes, and process baggage fees.

In addition, JetBlue reserves the right to inspect and audit PrimeFlight's books, records, and manuals at "all reasonable times," in order for JetBlue to ensure compliance with the procedures and requirements of the GTA and the right to access records that it requires PrimeFlight to maintain such as electronic tracking of wheelchairs, tracking of customer wait times and complaints, the number of hours worked by PrimeFlight employees and certification of employee quarterly training.

PrimeFlight is also required to provide JetBlue with a daily shift report as well as daily, weekly, and monthly accountings of data pertaining to wheelchair services. PrimeFlight is required to maintain staffing levels to JetBlue's satisfaction. In particular, Article 9.1 of the GTA provides as follows:

> The parties acknowledge that JetBlue's flight activity may increase or decrease over the duration of the Term, and that it will be the responsibility of PrimeFlight to maintain appropriate levels of personnel and equipment to perform the Services in strict accordance with this Agreement, regardless of any such activity.

JetBlue's SOW with PrimeFlight imposes requirements that employees be professionally dressed and neatly groomed. There are also rules regarding the handling of financial transactions and the issuance of documentation to passengers. There is a

[4] At the time of the hearing, JetBlue had not made such a demand. Respondent notes that it had only been approximately 5 months since PrimeFlight commenced its operations.

prohibition against using personal cell phones or sleeping while on duty.

JetBlue also reviewed and approved the uniforms PrimeFlight issued to its employees.

General Counsel, endorsed by the Union, does not contest that Respondent meets the first prong of the "derivative carrier test," but disputes that the evidence shows that JetBlue exercises substantial control over PrimeFlight in this instance.

At the hearing, Respondent stipulated that it has exclusive control over the hiring of its employees at JFK. With regard to promotions and demotions, Respondent stipulated that JetBlue does not provide recommendations with regard to PrimeFlight employees.

General Counsel argues that the issues of employee discipline and termination are controlled by PrimeFlight's employee handbook, rather than any contractual provision with JetBlue, either through the GTA or the SOW. These rules include drug and alcohol abuse, sexual and other prohibited harassment, personal appearance, and workplace etiquette. PrimeFlight generally follows a progressive discipline policy in which counseling is followed by a written warning, then suspension and discharge for a fourth offense. In this regard, General Counsel and the Union argue that there is nothing in the GTA which requires PrimeFlight to terminate an employee, or gives JetBlue an unqualified right to make such a demand. In this regard, two provisions of the GTA are relied upon: Section 7.6 which has been set forth above, and a provision of the SOW which provides that JetBlue can demand the removal of a skycap found to be "collecting revenue outside of the system."

General Counsel and the Union further contend that the record shows that PrimeFlight is exclusively responsible for the supervision and management of its employees, relying in significant part on Barry's concession in this regard. In addition, the record demonstrates that PrimeFlight maintains a full supervisory structure. Moreover, section 9.1 of the GTA provides as follows:

> Except as expressly set forth herein, Business Partner shall, at its sole cost and expense, furnish all labor, supervision, equipment, facilities, materials and supplies, and other requisites necessary for the proper performance of Services at each Airport.

[The remainder of section 9.1 has been set forth above].

It is argued that while JetBlue may provide feedback should it deem the level of staffing to be poor, PrimeFlight is responsible for assigning employees in the manner described above. In this regard, it assigns employees to their shifts and may change their schedules (which it, admittedly, has done).

General Counsel contends that Respondent conducts its business in the manner of a typical contractor. In support of these contentions, General Counsel relies upon Barry's testimony that JetBlue compensates Respondent according to a per-flight flat rate and is responsible for all of its expenses. In addition, Barry testified that PrimeFlight supplies a complement of wheelchairs, tablets used by wheelchair agents and supervisors, computers and a software system known as Centrak.

PrimeFlight is largely responsible for the training of its employees. Section 10.9 of the GTA provides that:

> Business Partner shall provide its employees, agents, representatives and subcontractors with all necessary initial and recurrent training, including familiarization with JetBlue Policies.

According to employees who testified at the hearing, it was PrimeFlight, not JetBlue that trained them. PrimeFlight's classroom training consists of several components. As Barry testified, PrimeFlight directs two: the "internal company training module" and "PrimeFlight technology application." The third module is "JetBlue policies, procedures and training," for which JetBlue provides training for PrimeFlight trainers, but does not directly train employees.

Both the General Counsel and the Union additionally point to the fact that PrimeFlight's employees are held out to the public as employees of PrimeFlight, not JetBlue. Employees wear uniforms bearing the PrimeFlight, not JetBlue, logo. Similarly, their identification badges demonstrate that they are employees of PrimeFlight. Respondent relies upon the fact that the uniforms were reviewed by JetBlue, but they were accepted with no changes.

Analysis and Conclusions

In the instant case, I find that the record does not support the Respondent's argument that the employees in question are indirectly controlled or under common control with a carrier or carriers to an extent sufficient to invoke the jurisdiction of the NMB under the Railway Labor Act.

As the National Labor Relations Board has found:

> In recent cases assessing whether it has jurisdiction over employers who supply services to an airline carrier or carriers but are not themselves engaged in the transportation of freight or passengers, the NMB has focusused on whether the carrier or carriers exercise "meaningful control over personnel decisions. See, e.g. *Airway Cleaners LLC*, 41 NMB 262, 268 (2014) (control exercised is "not the meaningful control over personnel decision[s] required to establish RLA jursisdiction"); see also *Menzies Aviation, Inc*. 42 NMB 1, 7 (2014) (no jurisdiction where carrier "does not exercise 'meaningful control over personnel decisions'" (quoting *Airway Cleaners*)); *Bags, Inc*.,40 NMB 165, 170 (2013) (carrier control "is not the type of meaningful control over personnel decisions [sufficient] to warrant RLA jurisdiction").Where it is not found such meaningful control, the NMB has emphasized in particular the absence of control over hiring, firing, and/or discipline) See *Menzies Aviation*, 42 NMB at 7; *Airway Cleaners*, 41 NMB at 269 and *Bags, Inc*., 40 NMB at 170.

Allied Aviation Service Co. of New Jersey, 362 NLRB No. 173, slip op at 1 (2015).

Here, I find the facts and extrapolated arguments advanced by the Respondent to be unavailing. These include, in particular, the fact that PrimeFlight uses space provided by JetBlue in terminal 5; the fact that PrimeFlight designs employee schedules and hours based upon the flight schedule provided by Jetblue; the tracking of the workforce to ensure sufficient staffing; the fact that the SOW imposes standards of conduct to which PrimeFlight employees must adhere and the right to insect PrimeFlight's books and records and to request other records as necessary. See, e.g., *Bags*, supra at 166–168.

With respect to discipline and termination, PrimeFlight's agreement with JetBlue does not provide the carrier with a unilateral right of removal, and there is no evidence to support any contention that this is the case. Rather, the relevant documents provide that if a skycap is found to be collecting revenue outside the system, JetBlue will request that the employee be removed from baggage checking services. However, there is no requirement that an employee be terminated; rather it appears that PrimeFlight retains the discretion to reassign the employee in question, as the GTA only provides for removal from baggage checking. Similarly, with regard to that provision which calls for PrimeFlight to discipline employees up to and including termination, if the employee causes work stoppages or interferes with JetBlue's ability to provide services, the ultimate disciplinary decision is left to the discretion of Respondent. With respect to hiring, the record shows that PrimeFlight has control over personnel decisions including the interviewing and decision as to whether to hire employees. PrimeFlight sets the rate of pay, benefits, disciplinary procedures and other work requirements for its employees. The record evidence regarding the nature and extent of PrimeFlight's interactions with JetBlue supervisory and managerial personnel fails to establish that JetBlue has authority to direct the work of PrimeFlight employees. While JetBlue provides PrimeFlight with certain equipment for employee use, the extent to which it does so is not determinative. See *Bags*, supra at 167. The training requirements are largely determined by PrimeFlight, and the fact that they may include certain aspects of the JetBlue curriculum, safety concerns, new programs and special events is similarly nondeterminative. Finally, the record is clear that PrimeFlight employees are intended to be, and are, held out to the public to be employees of that company and not of JetBlue.

Here, based upon the record as set forth above and considering the respective arguments of the parties in that context, I conclude that the elements of control are no greater that those found in a typical subcontractor relationship. PrimeFlight is required to furnish, at its own cost, labor, supervision, equipment, materials and supplies. It is responsible for the hiring, training and discipline of its employees. The extent to which JetBlue exercises control over PrimeFlight operations consists of generalized, broad constraints which relate to standards of performance. In parallel factual situations applying to airline contractors similar to Respondent, the NMB has repeatedly declined jurisdiction. See *Menzies Aviation, Airway Cleaners, Bags, Inc*., and *AirServ. Corp*., all discussed above. Moreover as further noted above, given similar factual circumstances, the Board has asserted jurisdiction over this Respondent in another location, acknowledging the "shift" in the NMB's position on such matters in recent years.[5]

Accordingly, I find that the National Labor Relations Board properly has jurisdiction over the PrimeFlight operations at terminal 5 at JFK.

The Alleged Unfair Labor Practices

The Successorship Issue

In the weeks leading up to the May 9, 2016 transition date, PrimeFlight hired its work force, with the intention of ensuring no gap in services once it assumed operations. To that end, PrimeFlight asked Air Serv to provide it with lists of active employees. In

[5] In this regard, I find the earlier decision in *PrimeFlight Aviation Services*, 353 NLRB 467 (2008), discussed above ,not to be controlling here due to the different factual contexts and the above-mentioned "shift" in jurisdictional analysis.

addition, Air Serv coordinated and communicated with PrimeFlight regarding those employees who would be offered the opportunity to apply for employment with the new contractor.

Between April 5 and May 7, 2016, Respondent hired 367 employees that it would employ on its first day of operation, May 9. There is no evidence that JetBlue had any input into these hiring decisions. Between May 7 and June 6, no additional employees were hired by PrimeFlight. Of these initial hires, as the General Counsel has conceded, 16 are excluded from the unit as they have been deemed statutory supervisors. Thus, throughout the entire first month of operations, the alleged bargaining unit consisted of 351 employees in the non-supervisory job categories: baggage handling, skycap services, line queue and wheelchair services. Of this number, 183 had previously worked for Air Serv.[6]

During the first month of operations, until June 6, the asserted bargaining unit consisted of 351 employees in the four job categories described above: baggage handling, skycap services, line queue and wheelchair services. Of this number of employees, 183 had previously worked for Air Serv.

Hiring resumed on June 6, but up until that time, as set forth above, over 50 percent of Air Serv's former statutory employees about whom there is no dispute had been employed by PrimeFlight. During this interim period, no additional job classifcations were added, and there is no evidence that any were subsequently introduced.

The record also establishes that since beginning operations on May 9, Respondent has, to some extent, utilized its work force interchangeably among job classifications. For example, baggage employee Denzyl Williams testified that he has performed wheelchair duties upon request, and has observed wheelchair employees performing baggage work. Similarly, wheelchair employee Omar Duhaney testified that, in addition to his wheelchair duties, he has also performed baggage duties on several occasions on a weekly basis. He has also observed baggage employees and line queue employees performing wheelchair duties.

The Union's Demand for Recognition, Bargaining and Information

On May 23, 2016, counsel for the Union sent the following letter to the general counsel of Respondent stating, in relevant part:

> Primeflight Aviation Services is the successor employer for two bargaining units represented by SEIU Local 32BJ. As such, PrimeFlight is legally obligated to recognize the union as the excjusive collective bargaining agent, bargain with us concerning terms and conditions of employment and to provide information necessary and relevant to collective bargaining. The two units are:

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[6] These statistics are culled from various exhibits entered into evidence during the hearing including: (1) the list provided by Respondent to the General Counsel of employees that it had hired who had formerly worked for Air Serv, entered by stipulation of the parties; (2) the lists of new hires as of May 9 and June 16, 2016, introduced by Respondent; (3) payroll records provided by Respondent to the General Counsel, as stipulated into evidence and (4) a different hire list provided by Respondent to the General Counsel during the investigative stage of the proceeding. Having reviewed these exhibits, I find that they support the numerical calculations of the General Counsel in this regard.

PrimeFlight's emplyees at JFK Aiport, the majority of whom were formerly Air Serv employees represented by Local 32BJ. These are employees working at Terminal 5 on the Jet Blue account, providng baggage handling, skycap and check point services. As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal 5 on the Jet Blue account, excluding supervisors office clericals, and guards as defined in the NLRA.

[The Union's second demand, for a unit of employees at Newark Liberty Airport is excluded here, as this unit is not at issue in these proceedings.]

Please provide dates on which you are available to bargain.

Please provide us with the following information necessary and relevant to collective bargaining:

A roster of all bargaining unit employees, including their names, addresses, telephone numbers, e-mail addresses, wages, shifts, classifications and start dates.

A copy of any employee handbook applicable to any bargaining unit employee.

A copy of the summary plan description for any health insurance or other employee benefit plan applicable to any bargaining unit employee.

Please provide this information in one week from receipt of this letter.

Finally, please be aware that prior to any change in the employees' terms and conditions of employment, you are required to provide notice and an opportunity to bargain to the Union. Failure to do so would be a violation of the National Labor Relations Act.

By letter dated May 25, 2016, Respondent's Senior Vice President of Human Resources William Stejskal III replied to the Union as follows:

In your letter to General Counsel, PrimeFlight Aviation Services dated May 23, 2016, it asserted tht Local 32BJ represents certain AirServ employees at JFK Airport and Newark Liberty Airport who are now employed by PrimeFlight. Please promptly provide me evidence that establishes the basis for this assertion, including the Board Certification(s) and Collective Bargaining Agreements(s).

On June 2, 2016 the Union replied as follows:

In reply to your letter of May 25, please find enclosed a copy of the Recognition Agreement between Air Serv Corportion and SEIU Local 32BJ, dated March 26, 2015, for a bargaining unit that encompassed the employees at issue at both JFK and Newark Airports.

By letter dated June 10, 2016, Stejskal requested that the Union provide any additional agreement between the parties, "that preceded the Recognition Agreement and stipulated the card check procedure referenced in the Recognition Agreement," should one

exist. Additionally, Stejskal asked Union counsel whether a collective bargaining agreement exists for any of the employees at issue, and explained that its requests are relevant to the Union's May 23 demand.

By letter dated June 15, 2016, the Union replied by stating, "We have supplied you with sufficient documentation to demonstrate that we represent the employees at JFK and Newark airport in which the former Air Serv employees constitute a majority of Respondent's nonsupervisory work force. After you acknowledge that the Union is the exclusive bargaining agent, we will be happy to provide any additional information which is necessary and relevant to collective bargaining. Please provide the authority that supports your claim that a collective-bargaining agreement or documents preceding the rcognition agreement are necessary to determine our representative status."

Subsequent to this exchange of correspondence, the record reflects no further communication between the parties.

Subsequent Hiring of Wheelchair Staff

Three days after the Union's May 23 demand for recognition, Respondent commenced hiring additional employees. The majority of the new hires were wheelchair service employees. By June 16, Respondent had hired 441 employees in total. Whereas more than half of its employees had been former Air Serv employees when the Union demanded recognition on May 23, as of June 16, fewer than half of Respondent's employees were former Air Serv employees. By the time Respondent had concluded hiring, on July 6, it had hired 507 employees. As a result of this hiring, former Air Serv employees comprised approximately 39 percent of the total number of employees.

PrimeFlight has contended that upon assuming operations on May 9, 2016, it determined that it needed 500 employees. In support of these contentions, Respondent relies primarily upon the testimony of Barry who stated that PrimeFlight came to understand that its initial staffing level was insufficient to "manage the volume of requests that [PrimeFlight] would be receiving in particular in the wheelchair operation."

Barry further asserted that the staffing problem was compounded by the fact that JetBlue had failed to properly communicate the work that PrimeFlight would be responsible for handling, including those who work with TSA in moving baggage being scanned. Thus, PrimeFlight estimated a need to hire an additional 250 employees, and targeted about 500 employees to be hired in two phases: the first in early June and the second in late June and early July.

A memorandum dated May 12, 2016, from a JetBlue representative to PrimeFlight managers states as follows:

261 Badges sound promising[7]

[7] According to an earlier email sent fron PrimeFlight representative Debra Gray to JetBlue representative Christopher Kemmerer, the 261 badges referred to the clearing of identification badges. Gray also stated in this email that PrimeFlight agents were "working significant amounts of overtime to try and support the operation. We have formulated teams of leads and supervisors to ensure as much gate coverage as possible while concentrating for preplanning for heavy flights, staging wheelchairs for large groups and watching the International flight arrivals."

> This evening . . . we had 6 JetBlue Customer Service supervisors plus a duty manager pushing wheelchairs through our Custmer hall
>
> For leadership's awareness, we would like to see a shift breakdown of staffing by each position at the beginning of the AM and PM shift starting tomorrow through the weekend.
>
> We are prepared to supplement you staffing at certain positions so that you can throw that manpower into the wheelchair operation.

On May 18, 2016, Vice President Barry sent the following email to various PrimeFlight managers:

> Need to divide task of priority within team.
> Next 10 days focus
> 1. Safety (who's giving daily safety briefings)
> 2. Schdules
> 3. Badging status of every employee
> 4. Payroll
> 5. Tip-sheets
> 6. Recruiting/training heavily (authorized to ad another admin position full time if needed)
>
> If we focus on doing these 6 things well in the next 10 days, we will see positive results.

Respondent relies upon Barry's explanatory testimony that he sent the email because of PrimeFlight's "concerns about not having enough staff to support the operation."

Analysis of the Successorship Issue

In *NLRB v. Burns International Security Services*, 406 U.S. 272, 287 (1972), the Supreme Court held that if a new employer "voluntarily [takes] over a bargaining unit" of its predecessor, then the successor employer is under a duty to bargain that represented the predecessor's employees." Under *Burns*, the obligation to recognize and bargain with an incumbent union exists when there is a (i) "substantial continuity" between the predecessor and successor enterprises, and (ii) when a majority of the employees of the successor, in an appropriate unit, had been formerly employed by the predecessor. *Burns*, 406 U.S. at 280–291. Subsequently, the Court further held that the determination of successorship is "primarily factual in nature and is based upon the totality of the of the circumstances in a given situation." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

The Supreme Court has made it clear that successorship status under and its progeny is predicated upon an employer's choice to hire more than 50 percent of its work force from its predessor's work force. See *Fall River*, supra at 41 (explaining that the successorship doctrine is based upon a "conscious decision" of the new employer "to maintain generally the same business and to hire a majority of its employees from the predecessor" and "[t]hat this makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor"). In the instant case, I conclude that PrimeFlight is a *Burns* successor because the record demonstrates that (i)

PrimeFlight substantially continued Air Serv's operations in terminal 5 and (ii) as of May 23, 2016, the date the Union demanded recognition, a majority of the employees that PrimeFlight hired were fomer employees of Air Serv in an appropriate bargaining unit.

Substantial Continuity

The "substantial continuity" inquiry involves the assessment of several factors:

> whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River, 482 U.S. at 43.

Here, the record evidence shows that the retained employees' perspective was that their jobs remained essentially unaltered. PrimeFlight operated Air Serv's operations in baggage handling, skycap and checkpoint services in basically unchanged form.

The transition between the two companies was overnight, with Air Serv concluding its operations on May 8 and PrimeFlight commencing opertions without interruption on May 9. As of May 9, the FrimeFlight employees in baggage handling, skycap, and checkpoint services were over 90 percent the same as those previously employed in these same classifications with Air Serv.

In this regard, I note that in its answer to the complaint, Respondent has admitted that since about May 9, 2016, Respondent has continued to operate the portion of Air Serv's business at JFK Airport in basically unchanged form.

I find that PrimeFlight's changes, such as altering uniforms and identification materials are minor. More telling is the fact that employees were performing the same work that they did for Air Serv, in the same location, with substantially the same supervision and with no interruption in service. Although PrimeFlight added another classification of customer service, wheelchair assistance, formerly provided by PAX Assist, that does not materially change the instant analysis. The employees' perceptions of their jobs (as described above) and their jobs themselves (as admitted) have not changed. The record demonstrates that employees viewed their jobs as being essentially unaltered, and that the new employer, PrimeFlight, intended for it to be that way, as well.

Based upon the foregoing, I find that there has been substantial continuity of operations to meet the test for successorship here.

Majority Status

Once the substantial continuity test has been satisfied, a successor's bargaining obligation requires that a majority of the employees of the successor, in an appropriate unit, were formerly employed by the predecessor. Here, the record shows that of May 23, 2016, when SEIU made its demand for recognition, over 50 percent of PrimeFlight's employees had previously been employed by Air Serv and were represented by SEIU Local 32BJ.

Respondent's defense is that on May 23 it had not yet finished hiring, and planned to do so in the near future. Relying on *Fall River*, supra at 47, Respondent argues that its bargaining obliagtion is triggered only if a "substantial and representative complement" existed at the time.

The Board and the courts have acknowledged that in determining whether a representative complement exists, there may be a startup period during which a new employer may gradually build its operations and hire employees. In determining the time when a "representative complement" exists and thus a bargaining obligation will attach, the Board considers various factors: whether the employer has substantially filed the unit job classifications designed for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work and the relative certainty of the expected expansion. *Fall River*, supra at 49.

As may be obvious, this analyisis turns on the facts of the case. In *Fall River*, the Court found the employer to be a *Burns* successor because it "had hired employees in virually all job classifications, and hired at least fifty percent of those it would untimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement." Id at 52. Here, as of the date that the Union demanded recogninition (May 23), PrimeFlight haad hired employees into all four job classifications; it had hired at least 50 percent in a majority of the classsifications, in fact hiring over 90 percent of the employees in three out of four job classifications.

Respondent's argument, supported primarily through the testimony of Barry, that upon commencing operations PrimeFlight had determined a need to hire additional employees in total of an excess of 500 employees is unsupported in the factual record. Barry's testimony is conclusionary and vague. There is no document in evidence or evidence of other communications among PrimeFlight principals to show that this was an eventual goal undertaken at the outset of operations, The hiring of additional employees did not commence until after the Union's initial demand for recognitioin and bargaining, and there is no convincing evidence that it contemplated doing so prior to that date. In this regard I note that while Barry's May 18 memorandum to employees enumerates a list of priorities, there is only one item which refers to "recruiting/training" and makes specific reference only to adding another administrative position if needed. Similarly, the email issued by Gray referred to employee overtime and formulating tems of leads and supervisors; but fails to address the issue of hiring additional employees. Such evidence is insufficient to show that Respondent expected to and had concrete plans to hire significant numbers of unit employees prior to, at the time or shortly after it assumed the contract at terminal 5.

The record demonstrates that Respondent was in full operation as of May 9. From the initial date of operation, PrimeFlight contracted with JetBlue to provide four types of services in terminal Five for JetBlue, and did so for two weeks until the Union's demand for recognition, with no gap in operation and no substantive evidence that it intended to significantly expand its operation in any manner.

Appropriate Unit

Majority status is found as of the date upon which a union demands recognition, as long as a representative complement exists. Once majority status is found, a successor's bargaining obligation requires that the unit remain appropriate for collective bargaining

under the successor's operations. In this regard, the Board has long found a single-facility unit to be presumptively appropriate and the party opposing it has a heavy burden to rebut such a presumtion. See e.g. *Trane*, 339 NLRB 866 (2003); *Budget Rent A Car Systems*, 337 NLRB 84 (2002). Moreover, as noted above, at the hearing employees testified about interchange among job classifications. In analyzing a successor's duty to bargain, the Board has found units which include previously unrepresented employees to be appropriate, as long as a majority of the entire unit is comprised of predecessor employees. *Good N' Fresh Foods*, 287 NLRB 1231, 1236–1237 (1988)(finding that successor was obliged to bargain with union in unit comprised of formerly unrepresented maintenance employees and represented production employees). There is no evidence rebutting the presumption that a single "wall-to-wall" unit would be appropriate here.

Accordingly, I conclude that as of the date of the Union's demand for recognition, May 23, 2016, Respondent employed a substantial and representative complement of its workforce in an appropriate bargaining unit, and Respondent failed to adduce sufficient evidence to rebut that presumption.

Thus, PrimeFlight was thereby obliged to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees.

The Refusal to Bargain, Provide Information and Unilateral Changes in Terms and Conditions of Employment

Refusal to Provide Information

Under Section 8(a)(5) of the Act, an employer is required to provide a union with relevant information necessary to perform its duties as collective-bargaining representative. *NLRB v. Acme Industries Co*., 385 U.S. 432, 435 (1967); *NLRB v. Truitt Mfg. Co.* 351 U.S. 149, 152 (1956). When a union's request for information pertains to employees within the bargaining unit, such information is presumptively relevant and the employer is obliged to provide it. *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

In the instant case, the requests made by the Union in its May 23 letter pertain directly to bargaining unit employees: (1) roster of bargaining unit employees; (2) employee handbook(s) applicable to any bargaining unit employee and (3) summary plan description(s) for any health insurance of other benefit plan applicable to any bargaining unit employee. These requests are therefore presumptively relevant. Respondent does not dispute that it failed to provide such information, and there is no evidence that it did so in a timely fashion, or at all. Thus, inasmuch as Respondent had a bargaining obligation with the Union under *Burns* and its progeny, Respondent was obliged to provide such information and its failure to do so is a violation of Section 8(a)(5) and (1) of the Act.

Unilateral Changes

Section 8(a)(5) further prohibits an employer from unilaterally changing, without providing to a union notice and an opportunity to bargain, mandatory subjects of bargaining. *NLRB v. Katz*, 369 NLRB 736, 747 (1962). A change to employee paid break time is a mandatory subject because it involves "rates of pay, wages, hours of employment, or other conditions of employment." See, e.g., *Litton Systems*, 300 NLRB 324 (1990) (employer violated Section 8(a)(5) by eliminating extra paid half hour for lunch the day prior to Christmas); *Xidex Corp*., 297 NLRB 110 (1989)(employer violated Section 8(a)(5) by replacing 30 minute unpaid break with 15 minute break). As it has been shown that

Respondent was a successor under *Burns* and its progeny beginning as of May 23, Respondent was under an obligation to provide notice and an opportunity to bargain over changes to employee paid break time.

Respondent has admitted that since August 26, 2016, it has deducted pay from employee paychecks for unpaid break time, and the record establishes that it did so without prior notice to the Union or affording the Union an opportunity to bargain with respect to this conduct and the effects of such unilateral changes.[8] Inasmuch as Respondent, as a *Burns* successor, was not privileged to implement such unilateral changes and by doing so, Respondent violated Section 8(a)(5) and (1) of the Act.

As noted above, Section 8(a)(5) of the Act prohibits an employer from changing mandatory subjects of bargaining without notice and bargaining. Board law has made clear that employee schedules and workhours are mandatory subjects of bargaining with may not be unilaterally changed. *Katz*, supra at 747; *Palm Beach Metro Transportation, LLC*, 357 NLRB 180 (2011)(reduction of workhours in response to fluctuations in available work); *Illiana Transit Warehouse Corp*., 323 NLRB 111 (reduction of hours); *Dickerson-Chapman, Inc*., 313 NLRB 907 (1994)(same). The "particular hours of the day and the particular days of the week during which employees shall be required to work are well within the realms of wages, hours and other terms and conditions of employment' about which employers and unions must bargain." *Milwrights, Conveyors and Machinery Erectors Local No. 1301*, 321 NLRB 30, 31 (1996).

Here, Respondent has admitted that since about September 12, 2016, it has made changes to employee work schedules which included changing scheduled work days and reducing workhours. Respondent has also admitted that it made such changes with prior notice to the Union and without affording the Union the opportunity to bargain with respect to this conduct and its effects. Accordingly, based upon my conclusion that Respondent is a *Burns* successor, I find that by doing so, Respondent has violated Section 8(a)(5) and (1) of the Act.

The Threat of Discharge

Employee Omar Duhaney testified that in June, admitted supervisor and agent Erick Brazao-Martinez told Duhaney and other employees (as Duhaney recounted), "Don't join the Union. We've only been with PrimeFlight for a couple of months. Be smart guys. If you join the Union you will get fired." No witness was presented to rebut this testimony, and based upon this factor, coupled with the demeanor of the witness and the clear and unambiguous nature of his testimony, I credit it.

Threatening employees with discharge because of their union or concerted, protected conduct is a classic violation of Section 8(a)(1) of the Act. *Pressroom Cleaners*, 361 NLRB No. 57 (2014) (supervisor's statement that employees would be fired if they continued to talk to a union representative was a "classic and blatant" violation of Section 8(a)(1)); See also *Pioneer Hotel & Gambling Hall, Inc*., 276 NLRB 694, 698 (1985).

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[8] There is unrebutted testimony to the effect that employees had previously been asked to sign a form acknowledging that 30 minutes per day will be deducted from their pay to account for break time. This had not previously been done and no policy to such effect had previously been enforced. See *Flambeau Airmold Corp*., 334 NLRB 165 (2001) (enforcement of previously unenforced rule constituted unilateral change).

Based upon the foregoing, I find that by threatening employees with discharge should they join the Union, Respondent, by its admitted supervisor and agent, violated Section 8(a)(1) of the Act.

Conclusions of Law

1. PrimeFlight Aviation Services, Inc. (PrimeFlight, Employer or Respondent) is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.
2. Service Employees International Union, Local 32BJ (Union) is a labor organization within the meaning of Section 2(5) of the Act.
3. The following unit constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

   All full-time and regular part-time employees employed by Respondent at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act.
4. Since May 23, 2016, and at all times material thereafter the Union has been, and is now, the exclusive collective bargaining of Respondent's employees in the above-described unit within the meaning of Section 9(b) of the Act.
5. PrimeFlight has engaged in conduct in violation of Section 8(a)(5)and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit.
6. By refusing to provide the following information to the Union on and after May 23, 2016, Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act:

   A roster of all bargaining unit employees, including their names, addresses, telephone numbers, e-mail addresses, wages, shifts, classifications and start dates;
   A copy of any employee handbook applicable to any bargaining unit employee;
   A copy of the summary plan description for any health insurance or other employee benefit plan applicable to any bargaining unit employee.
7. By making the following changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over such changes, Respondent has engaged in conduct in violation of Section 8(a)(5)and (1) of the Act:

   Since about August 26, 2016, deducting pay from employee's paychecks to account for unpaid break time;
   Since about September 12, 2016, changing employee work schedules including work days and reducing hours;
8. In or about June 2016, Respondent by supervisor and agent Eric Brazao, violated Section 8(a)(1) of the Act by threatening employees with discharge because they engaged in conduct in support of the Union.
9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent has unlawfully failed and refused to recognize and bargain with the Union, I shall recommend that Respondent recognize the Union as the exclusive collective-bargaining representative of its employees in the above-described unit and, upon request, meet and bargain in good faith concerning wages, hours, benefits and other terms and conditions of employment, and if an agreement is reached reduce the agreement to a signed written contract. Respondent also shall be ordered to provide to the Union the information requested in its May 23, 2016 letter. Additionally, the Respondent shall, on request of the Union, rescind any departure from terms and conditions of employment that existed before the Respondent's takeover of operations at JFK Airport and retroactively restore preexisting terms and conditions of employment including work schedules and compensation for break time that would have been paid, absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970) enfd. 444 F.3d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, PrimeFlight Aviation Services, Inc., Queens, New York, it officers, agents succesors and assigns shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-argaining representative of its employees in the following unit:
All full-time and regular part-time employees emplotyed by Respondent at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act.

(b) Refusing to provide the following information to the Union:
A roster of all bargaining unit employees, including their names, addresses, telephone numbers, addresses, wages, shifts, classifications and start dates;a copy of any employee handbook applicable to any bargaining unit employee; a copy of the summary plan description for any health insurance or other employee benefit plan applicable to any bargaining unit employee.

(c) Making changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over such changes.

(d) Threatening employees with discharge because they engage in conduct in support of the Union.

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9 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, meet and bargain with the Union as collective-bargaining representative of its employees in the described appropriate bargaining unit concerning terms and conditions of employment and, if agreement is reached, embody the agreement in a signed collective-bargaining agreement.

(b) Provide the information to the Union requested in its May 23, 2016 letter.

(c) Upon request, rescind the unilateral changes made to employee terms and conditions since May 23, 2016 and make whole employees for the effects of such changes as described in the remedy portion of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at the Respondent's facility at JFK Airport and at other appropriate facilities nationwide, as discussed above, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting or intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C March 9, 2017

Mindy E. Landow
Administrative Law Judge

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representative of our employees in the following unit:

All full-time and regular part-time employees employed by us at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act.

WE WILL NOT refuse to provide information to the Union which is necessary and relevant to their function as the collective-bargaining representative of unit employees.

WE WILL NOT make changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over such changes

WE WILL NOT threaten employees with discharge because they engage in conduct in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, meet and bargain with the Union as collective-bargaining representative of its employees in the described appropriate bargaining unit concerning terms and conditions of employment and, if agreement is reached, embody the agreement in a signed collective-

bargaining agreement.

WE WILL provide to the Union information which is necessary and relevant to its function as collective-bargaining representative of unit employees.

WE WILL, upon request, rescind the unilateral changes made to employee terms and conditions since May 23, 2016 and make whole employees for the effects of such changes, with interest.

PRIMEFLIGHT AVIATION SERVICES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center (North), 100 Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-3838
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-177992 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-765-6190.

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. Sec. 151 et. seq.

Section 1 (29 U.S.C. § 151):

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

Section 2(2) (29 U.S.C. § 152(2)):

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States * * * or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer, or anyone acting in the capacity of officer or agent of such a labor organization.

Section 2(3) (29 U.S.C. § 152(3)):

> The term "employee" shall include any employee * * * but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7 (29 U.S.C. § 157):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,

and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) (29 U.S.C. § 158(a)):

It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees* * *.

* * *

Section 8(d) (29 U.S.C. § 158(d)):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require making a concession* * *.

* * *

Section 10(c) (29 U.S.C. § 160(c)):

* * *

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

Section 10(j) (29 U.S.C. § 160(j)):

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

RAILWAY LABOR ACT, 45 U.S.C. § 151 et. seq.

Section 1 (45 U.S.C. § 151):

When used in this Act for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation * * * and handling of property transported by railroad * * *.

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2017, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully submitted,

/s/ Jonathan M. Psotka
Attorney

Dated at Washington, D.C.
This 22d day of March 2017